TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 145.

JAMES B. SWING, AS TRUSTEE FOR THE CREDITORS OF THE UNION MUTUAL FIRE INSURANCE COMPANY OF CINCINNATI, OHIO (FORMERLY A CORPORATION), PLAINTIFF IN ERROR,

vs.

THE WESTON LUMBER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED NOVEMBER 6, 1905.

(19,957.)

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1 STATE OF MICHIGAN:

In the Circuit Court for the County of Schoolcraft.

JAMES B. SWING, as Trustee for the Creditors and Policy-Holders of the Union Mutual Fire Insurance Company of Cincinnati, Ohio, (Dissolved,) Plaintiff and Appellant,

vs.

THE WESTON LUMBER COMPANY, Defendant and Appellee.

Declaration.

STATE OF MICHIGAN:

In the Circuit Court for the County of Schoolcraft—County of Schoolcraft, *ss.*

James B. Swing, as Trustee for the creditors and policy-holders of the Union Mutual Fire Insurance Company, of Cincinnati, Ohio, dissolved, by Virgil I. Hixson, his attorney, comes and files this declaration as commencement of suit and complains of the Weston Lumber Company, a corporation organized under the laws of the State of Michigan, defendant herein of a plea of trespass on the case on promises, for that, the Supreme Court of Ohio, in case No. 2541 thereof, in which The State of Ohio, *ex rel.* Attorney-General was plaintiff and said Insurance Company was defendant, on December 18th, 1890, disincorporated said Insurance Company, and in said cause, appointed the plaintiff the Trustee for the creditors and policy-holders of said Insurance Company, and the Plaintiff accepted said trust and duly qualified and is acting as such Trustee, and brings this action by order of said Court.

And the Plaintiff avers that said The Union Mutual Fire Insurance Company, of Cincinnati, was a mutual fire insurance company, incorporated under the laws of Ohio, May 27th, 1887, and doing business as such during the years 1888, 1889 and 1890. That the laws of Ohio in force during the years 1888, 1889 and 1890, pertaining to mutual insurance companies, provided and provides as follows:

2 SECTION 3634. "Mutual fire insurance companies organized under this act may thereafter charge and collect in advance upon their policies a full annual premium in cash, but such policies shall not compel subscribers, insured or assured, to renew any policy nor pay a second further annual or term premium. Any such company must, in its by-laws, and must in its policies, fix by a uniform rule the contingent mutual liability of its members for the payment of losses and expenses; and such contingent liability shall not be less than three nor more than five annual cash premiums as written in the policy; but such liability shall cease with the expiration of the time for which a cash premium has been paid in advance, except for liability incurred during said time."

SECTION 3650. "Every person who effects insurance in a mutual company and continues to be insured, and his heirs, executors, administrators, and assigns, shall thereby become members of the company during the period of insurance, and shall be bound to pay for losses and such necessary expenses as accrue in and to the company in proportion to the original amount of his deposit note or contingent liability; and the directors shall, as often as they deem necessary, settle and determine the sum to be paid by the several members thereof, and publish the same in such a manner as they may choose, or as the by-laws prescribe, and the sum to be paid by each member shall always be in proportion to the original amount of liability, and shall be paid to the officers of the company within thirty days next after the publication of such notice; provided, that whenever such company is not possessed of cash funds above its re-insurance reserve sufficient for the payment of incurred losses and expenses, it shall be deemed to have impaired its capital, and when such impairment shall exceed twenty-five per cent. of the reinsurance reserve required to be maintained, it shall make an assessment for the amount needed to pay such losses and expenses upon its members liable to assessment therefor in proportion to their several liabilities, and to make good the reinsurance reserve; and no such company shall borrow money or create a debt, unless for the purpose of necessary office buildings, to continue beyond the period when such assessment may be collected and applied to the payment thereof, and no member shall be assessed for liabilities incurred prior to his membership."

That the defendant, The Weston Lumber Company, is a corporation organized under the laws of Michigan, and as such corporation accepted from said insurance company, two policies of insurance, issued by said insurance company to said defendant, insuring the property of said defendant against loss by fire and lightning. That said policies were respectively of the number, for the amount insured, and were held in force by said defendant for the
3 periods of time and for the amounts of annual premium as follows, viz:

No. 3078, for $5,000, from Sept. 1, 1889 to Sept. 1, 1890, premium $125.00.

No. 5207, for $5,000, from Sept. 1, 1890 to Dec. 19, 1890, premium $125.00.

That the contingent liability to assessment of said defendant as a policy-holder in said mutual fire insurance company, as provided by the laws of Ohio, as aforesaid, was and is not less than three nor more than five annual cash premiums as written in the policy, and, that by the decree of June 11th, 1901, of the Supreme Court of Ohio, making the assessment decree herein referred to, said defendant's liability to assessment on all policies held by said defendant in said insurance company, was and is fixed at five times the agreed annual premium; and that said defendant's liability on its said policies was and is five times the amount of the respective annual premiums as hereinbefore and hereinafter set out.

That by accepting and holding said policies so issued by said insurance company, said defendant effected insurance in said insurance company during the times and in the amounts aforesaid, and by reason thereof, said defendant became legally and equitably liable for its just proportion of all losses and expenses incurred by said insurance company during the time the said defendant held said policies and to pay such assessments on the amount of the said contingent liability to assessment of said defendant's said policies of insurance, as should be required by law.

The said Supreme Court of the State of Ohio in said case No. 2541 thereof, on June 11th, 1901, made and entered a decree of assessment in which are the words and figures following, to-wit:

"And it is hereby decreed that the following assessments shall be made against all persons who held policies of insurance in said Company on and between April 25th, 1889 and Dec. 18th, 1890, as follows, to-wit:

1st Qr. Between and including April 25th, 1889 and June 30th, 1889, the amount of unpaid liabilities incurred by said Company, including interest and expense of collection, is $8,916.67, and the total amount remaining unpaid of premium notes and contingent liability of persons then holding policies and now solvent, was $126,117.94, and the assessment on said premium notes and contingent liability shall be Seven and Seven-hundred-and-one Ten-thousandths per cent. (7.0701 per cent.).

2d Qr. Between and including July 1st, 1889 and Sept. 30th, 1889, the amount of unpaid liabilities incurred by said Company, including interest and expense of collection, is $6,113.55, and the total amount remaining unpaid of premium notes and contingent liability of persons then holding policies and now solvent, was $170,648.13 and the assessment on said premium notes and contingent liability shall be Three and Fifty-eight-hundred-and-twenty-five Ten thousandths per cent. (3.5825).

4 3d Qr. Between and including Oct. 1st, 1889 and Dec. 31st, 1889, the amount of unpaid liabilities incurred by said Company, including interest and expense of collection, is $8,656.69, and the total amount remaining unpaid of premium notes and contingent liabilty of persons then holding policies and now solvent, was $179,417.62, and the assessment on said premium notes and contingent liability shall be Four and Eighty-two-hundred-and-forty-eight Ten-thousandths per cent.. (4.8248 per cent.).

4th Qr. Between and including Jan. 1st and March 31st, 1890, the amount of unpaid liabilities incurred by said Company, including interest and expense of collection, is $14,400.62, and the total amount remaining unpaid of premium notes and contingent liability of persons then holding policies and now solvent, was $205,154.48, and the assessment on said premium notes and contingent liability shall be Seven and One-hundred-and-ninety-four Ten thousandths per cent. (7.0194. per cent.).

5th Qr. Between and including April 1st, 1890 and June 30th, 1890, the amount of unpaid liabilities incurred by said Company, including interest and expense of collection, is $3,690.62, and the total

amount remaining unpaid of premium notes and contingent liability of persons then holding policies and now solvent, was $201,026.33, and the assessment on said premium notes and contingent liability shall be One and Eighty-three-hundred-and-fifty-eight Ten-thousandths per cent. (1.8358 per cent.).

6th Qr. Between and including July 1st, 1890 and Sept. 30th, 1890, the amount of unpaid liabilities incurred by said Company, including interest and expense of collection, is $62,768.40, and the total amount remaining unpaid of premium notes and contingent liability of persons then holding policies and now solvent, was $224,096.63 and the assessment on said premium notes and contingent liability shall be Twenty-eight and Ninety-five Ten-thousandths per cent. (28.0095 per cent.).

7th Qr. Between and including Oct. 1st, 1890 and Dec. 18th, 1890, the amount of unpaid liabilities incurred by said Company, including interest and expense of collection, is $81,347.72, and the total amount remaining unpaid of premium notes and contingent liability of persons then holding policies and now solvent, was $199,729.29, and the assessment on said premium notes and contingent liability shall be Forty and Seventy-two-hundred-and-eighty-nine Ten-thousandths per cent. (40.7289 per cent.).

That said decree of assessment is still in full force and effect. That said defendant's proper assessment under said decree, in order to pay the losses and expenses of said Association, during the time said defendant's property was insured therein as aforesaid, was and is in detail as follows:

5

In said 2d qr.	3.5825	per cent.	of	$625,	that is $22.39
" 3d "	4.8248	"	"	"	30.15
" 4th "	7.0194	"	"	"	43.87
" 5th "	1.8358	"	"	"	11.47
" 6th "	28.0095	"	"	"	175.05
" 7th "	40.7289	"	"	"	254.55

So that the total amount of said defendant's said assessment under said decree in order to pay the defendant's just proportion of the unpaid losses and expenses incurred by said insurance company during the time the said defendant held its said policies, is.....$537.48

That said defendant was on or about March 13th, 1903, duly notified according to law by written and printed notice sent to it by registered mail by said Trustee, to pay said assessment on or before thirty days thereafter, by means whereof said defendant became liable to pay this plaintiff the sum of money so assessed against it as aforesaid, and being so indebted, the defendant, in consideration thereof, promised the plaintiff to pay him the said sum of money at his request.

Yet, the defendant,though often requested, has not paid the same,

nor any part thereof, to the plaintiff, but neglects and refuses so to do.
To the damage of the plaintiff, One Thousand Dollars ($1,000.00), and therefore he brings this suit, etc.

JAMES B. SWING, *Trustee.*

VIRGIL I. HIXSON,
Attorney for Plaintiff.

Business Address: Manistique, Michigan.

Plea.

STATE OF MICHIGAN :

The Circuit Court for the County of Schoolcraft.

JAMES B. SWING, as Trustee for the Creditors of the Union Mutual Fire Insurance Company of Cincinnati, Ohio, (Dissolved),
vs.
THE WESTON LUMBER COMPANY.

Now comes the said defendant, the Weston Lumber Company, by C. W. Dunton, its attorney, and demands a trial of the matters set forth in the plaintiff's declaration.

C. W. DUNTON,
Attorney for Defendant.

6 To the plaintiff:

Please take notice that upon the trial of this cause the defendant will show in its defense, under the general issue above pleaded, the following matters of special defense:

1st. That it did not at any time within six years before the commencement of this suit, promise in manner and form as the plaintiff has in his declaration complained against it.

2nd. That prior to the commencement of this suit more than ten years have elapsed since the rendition of said decree No. 2541 in the cause of the State of Ohio, *ex rel.*, the attorney general, plaintiff *vs.* The Union Mutual Fire Insurance Company of Cincinnati, Ohio, defendant, in the Supreme Court of Ohio.

3rd. That prior to the commencement of this suit no notice of said assessment was given to the said defendant.

4th. That the said plaintiff during all the time of its existence and at the time of the alleged issuing of said policies of insurance was a foreign corporation and was not authorized to transact business in the State of Michigan.

5th. That said alleged policies of insurance were issued in direct violation of the laws of the State of Michigan, said insurance company not having complied with the statutes and laws of this state relative to foreign insurance companies doing business in this state.

6th. That the said alleged contracts of insurance were at variance with and contrary to the settled policy of this state.

7th. That the statute of limitations, viz: Ten years had run against the said judgment and decree of the Supreme Court of the State of Ohio, in the said cause No. 2541 before any action whatever had been taken by the said trustee to enforce the provisions of said decree against this defendant.

C. W. DUNTON,
Attorney for Defendant.

Residence: Manistique, Michigan.

7 *Bill of Exceptions.*

STATE OF MICHIGAN:

The Circuit Court for the County of Schoolcraft.

JAMES B. SWING, as Trustee for the Creditors and Policy-Holders of the Union Mutual Fire Insurance Company of Cincinnati, Ohio, (Dissolved), Plaintiff,

vs.

THE WESTON LUMBER COMPANY, Defendant.

This cause came on to be tried before the Court, without a jury, on the Twenty-eighth day of June, 1904, and thereupon the following proceedings were taken and had upon said trial, viz:

The Plaintiff introduced in evidence a certified transcript of the docket and journal entries of the proceedings in the Supreme Court of Ohio in the cause wherein the decree dissolving the Plaintiff's insurance company and the decree of assessment were made and the Plaintiff appointed as trustee, including certified copies of said decree dissolving said insurance company, and of said decree of assessment, duly certified under an Act of Congress, which decree of assessment is in the language set forth in Plaintiff's declaration in this cause. (Plaintiff's exhibit "A" hereto attached.)

Plaintiff also introduced, in evidence a certified copy of the charter by which The Union Mutual Fire Insurance Company was organized, showing its due organization. (Plaintiff's exhibit "B" hereto attached.)

Plaintiff also introduced in evidence a certified copy of Sections 3634 and 3650 of the revised Statutes of Ohio duly certified by the Secretary of State of Ohio under his official seal, showing the laws of Ohio in force during the years 1888, 1889 and 1890 pertaining to mutual insurance companies, which said section 3634 and 3650 are as set forth in Plaintiff's Declaration in this case. (Plaintiff's exhibit "C" hereto attached.)

JAMES B. SWING.

James B. Swing was examined as a witness and his testimony taken by deposition after due notice and returned according to the rules and practice of the Court, and testified that he resided at Cincinnati,

Ohio, and had in his possession in Cincinnati, Ohio, the original books and papers of The Union Mutual Fire Insurance Company of Cincinnati by permission of the Supreme Court of Ohio, but that said books are each made an Exhibit in case No. 2541 of the Ohio Supreme Court and that witness is not able to produce the books of any of them at the trial of this cause or attach them as exhibits to his deposition because said Supreme Court of Ohio would not permit them to be removed and because they are needed in the trial of said cause in the Ohio Supreme Court, that the policy registers of said insurance company show policy No. 3078 issued to Weston Lumber Company, Sept. 1st, 1889 for $5,000.00 insurance on lumber yards for one year, assessable basis $625.00. Cash premium $125. Also
8 policy No. 5207 issued to Weston Lumber Company September 1st, 1890 for $5,000.00 insurance on lumber yards for one year, assessable basis $625.00, cash premium $125.00. Both through George R. Lewis, Minneapolis, Minn. (Plaintiff's exhibit "1" being an exact copy of the entries in said policy registers relative to said insurance.)

Witness also produced duplicate of binding receipt issued by said insurance company through G. R. Lewis & Co. of Minneapolis, to the Weston Lumber Company insuring the latter for $5,000.00 from August 30, 1889 to September 1st, 1889 also the original daily report of G. R. Lewis & Co. of Minneapolis, Minn., sending in the binding receipt above mentioned and the application for the insurance in question. (Plaintiff's exhibits "2" and "3" respectively.)

Witness also produced the application No. 5795 for said policy No. 3078, said application being Plaintiff's exhibit No. "4" also form or description of property attached to application and being duplicate of that attached to said policy. (Plaintiff's exhibit No. "5.")

Witness also testified that G. R. Lewis & Company, Minneapolis, number for policy No. 3078 was No. 07813 and for policy No. 5207 was No. 08180.

Witness also testified that the cash book of said insurance company shows under date of October 19th, 1889, the following entry: "Received from Geo. R. Lewis & Co., Minn. for Weston Lbr. Company $125 premium." "Paid to Geo. R. Lewis & Co., Minn., for Weston Lbr. Company $31.25 brokerage and commission," that the original policy No. 3078 issued Sept. 1st, 1889, was never returned to plaintiff company, but that it was exactly like policy No. 5207 except in number and date, policy No. 5207 being issued Sept. 1st, 1890 in renewal of policy No. 3078. Witness also produced the original daily report of G. R. Lewis & Co. of Minneapolis, sending in application for policy No. 5207. (The same being Plaintiff's exhibit No. "6."

Witness also produced form or description of property attached to application for policy No. 5207 the same being (Plaintiff's exhibit No. "8.") and the application (Plaintiff's exhibit No. "7") and also the original policy No. 5207 (Plaintiff's exhibit No. "9") together with the form or description of property thereto attached (Plaintiff's exhibit No. "10") and testified that said policy was returned to him by The Weston Lumber Company and was cancelled on register of

said insurance company as of date Dec. 19th, 1890, which was first day witness had charge of the affairs of said insurance company.

PATTERSON A. REECE, a witness produced and sworn and testimony taken by deposition: testifies as follows:

9 My name is Patterson A. Reece. I am 52 years old and reside in Cincinnati, Hamilton county, Ohio, and am an attorney-at-law and have been over 26 years. I am the attorney for James B. Swing, plaintiff in this action in the matter of winding up The Union Mutual Fire Insurance Company of Cincinnati, Ohio, and as such attorney, on March, 10th, 1903, I sent a notice, of which I hereto attach a carbon copy, marked Exhibit No. "11." I sent the original of this carbon copy addressed Weston Lumber Co., Manistique, Michigan, by registered mail, and in due course, by mail, I received the registry receipt for same, which I hereto attach and mark part of this deposition, marked Exhibit No. "12," and which is postmarked "Manistique, Michigan, March 13, 1903," and signed "Weston Lumber Co., by Earl Winn."

I never received any other communication from this defendant than this registry receipt, and the assessment not being paid at the end of thirty days, I sent the claim for collection to Virgil I. Hixson, Esq., of Manistique, Michigan.

VIRGIL I. HIXSON, a witness for plaintiff testified as follows:

I have resided in Manistique, for upwards of 12 years. I known Willis C. Marsh who was formerly connected with the Manistique Bank in this city, and am acquainted with his handwriting. Witness then stated that the signature to the letters marked Plaintiff's exhibits "E," "F" and "G" was that of Willis C. Marsh, said letters were then read in evidence. Witness then testified that the red ink notation on the bottom of the letter marked Plaintiff's exhibit "H" and purporting to be an answer to the letter was also in the handwriting of Willis C. Marsh and the same was read in evidence.

Demand was then made upon defendant to produce the original notice of assessment served on it, and the same being produced it was received in evidence and marked Plaintiff's exhibit "D" and it was conceeded by Defendant's attorney that it was received by defendant on March 13, 1903.

WILLIS C. MARSH, witness on behalf of defendant, testified as follows:

I live in St. Paul, Minn., but formerly resided at Manistique, Mich. and was connected with the Manistique Bank of Manistique, during several years after May or June of the year 1889, until about 1894 in the capacity of book-keeper, assistant cashier and cashier. During that time the Manistique Bank was engaged in the insurance business and mortgage loan business as well as the banking business.

I know the Weston Lumber Company of Manistique, Michigan, and have in the past few days refreshed my recollection as to certain policies one time issued by the plaintiff in this case to the defendant.

Policy was issued in September, 1889 and there seems to be a record of another in the nature of a renewal a year later, September, 1890, the numbers that were recorded in the correspondence were 07813 and 08180. The amount in each case was $5,000.00 and issued by plaintiff to defendant.

Q. What do you know of the manner in which these policies were issued?

A. Well, I can find no record of that and my only recollection of that is from the correspondence there, as it is refreshed by
10 the correspondence. There were twelve policies altogether secured through C. H. Spencer & Co. to increase the line that we had on these companies lumber and the policies that we had through the bank from other sources was not sufficient, and in the regular course of business we applied for this agency and they furnished these two policies, together with others.

Q. What was the name of that agency?

A. C. H. Spencer & Co.

Q. Of where?

A. Minneapolis. They were in the Loan and Trust Building, I think it is 17 and 18 and 19.

Q. Did you know George R. Lewis & Co. of Minneapolis, in the transaction?

A. No sir.

I refreshed my recollection by my own individual correspondence, the letters written by me as an employee of the bank. I am not quite sure whether I was acting as assistant cashier at that time, in that capacity perhaps, but I don't know whether I was authorized to attach that signature or not just at that time, I was a little later on. The amount of the premium on each of these policies was $125.00 and was remitted by draft to C. H. Spencer & Co. from me. So far as I know the original application for this insurance was made to C. H. Spencer & Co. through me, the Weston Lumber Company first applying to the bank. I do not know anything about plaintiff's exhibit No. "7" entitled an application, except in the correspondence this (Plaintiff's exhibit No. "8") what I think is the form generally used by the lumber company on their lumber and prescribed by law at that time, was sent on by me for the Bank, to C. H. Spencer & Co. to put on the policies. I do not know anything about there being no signature to the application.

Cross-examination:

The copy of the letter written by me is in the Manistique Bank but I didn't find any letters from Spencer. The correspondence for a year or so there I did not find. I first formed my connection with the Manistique Bank in May or June of 1889, the Bank had been organized about two months previous to that time, I think it organized in May and I came on in June. W. H. Hill was president of the Bank at that time and was also superintendent of the Weston Lumber Company and of the Chicago Lumbering Company. In fact the Chicago Lumbering Company and Weston Lumber

Company conduct their business together, through the same office, and did at that time. Mr. A. Weston, who was at that time the principal stockholder in the Weston Lumber Company and the Chicago Lumber Company, was also a stockholder in the bank and had ten thousand dollars out — fifty thousand dollars of the stock and Mr. Hill, the president, had stock in the bank and was superintendent of the company and M. H. Quick, also a member of the company was also a stockholder in the bank. The bank was not organized by the stockholders of the Weston Lumber Company, they were directors, they didn't promote the organization of it. George H. Orr, who was a member of the Chicago Lumbering Company and the Weston Lumber Company also had stock in the bank.

11 At the time of the organization of the bank the members of the Weston Lumber Company held fifteen thousand dollars of the stock. I do not remember what member of the Weston Lumber Company applied for the insurance and cannot recollect whether the first application or first talk in regard to insurance was had with me or not.

I was not attending to all of the inside business of the bank at that time and was not cashier. I think I became cashier in the spring of 1890. I had placed considerable insurance with the agencies that my bank represented on this same lumber and the same agencies were not able to carry the insurance to as large an amount as the company wanted to place so they requested me to secure some other insurance for them, as I remember it they asked for an amount of insurance which was raised from different sources. They were familiar with the fact that I could not furnish that amount in the agencies I had in the bank. I am sure the premium was paid on the renewal policy but do not know how long that renewal policy remained in force. At that time J. D. Mersereau was secretary of the Chicago Lumbering Company and Weston Lumber Company and was also a stockholder in the bank.

The defendant then offered in evidence a stipulation filed in the case and signed by the attorneys for the respective parties, which stipulation was marked defendant's exhibit No. "1," a copy of which is hereto attached.

Defendant then offered in evidence the statutes of the state of Ohio, relative to the limitation of actions as to the time within which personal actions may be brought and also as to the time which a judgment remains in force and effect.

No further testimony was offered by either party.

The plaintiff filed a written request for findings of facts and law by the Court, and also before judgment presented and filed the following requests for special findings, pursuant to the statute and rules of the court:

The Circuit Court for the County of Schoolcraft.

JAMES B. SWING, as Trustee for the Creditors and Policy-Holders of The Union Mutual Fire Insurance Company of Cincinnati, Ohio, (Dissolved,) Plaintiff,

vs.

THE WESTON LUMBER COMPANY, Defendant.

Now comes the above named plaintiff by Virgil I. Hixson his attorney, and requests the court to find as a matter of law:

1. It is shown by the undisputed testimony in this case that the Supreme Court of the state of Ohio made a decree of assess-
12 ment against the policy-holders of the Fire Insurance Company of which this plaintiff is the trustee for creditors and that such decree is still in force and effect, and that said decree defines the liability and percentages of assessments for the respective periods of time during which the unpaid liabilities of said insurance company were incurred.

2. The undisputed testimony in this case shows that the policies of insurance described in the declaration filed in this suit were issued to and held by the defendant during the respective periods of time and for the agreed annual premium as set out in the declaration.

3. That the decree of the assessment made by the Supreme Court of Ohio is binding upon the defendant and is conclusive in this case, notwithstanding that the defendant was not served with summons in the action in which said decree of assessment was made.

4. That the undisputed evidence in this case shows that The Union Mutual Fire Insurance Company of Cincinnati, Ohio, was a mutual fire insurance company, incorporated under the laws of Ohio, May 27th, 1887, and was doing business as such during the years of 1889 and 1890.

5. That the laws of the State of Ohio in force during the years 1888, 1889 and 1890 pertaining to mutual insurance companies was as set out in plaintiff's declaration in this case and governs the liabili[illegible] of the defendant in this case.

6. That the defendant was duly notified of the said assessment according to law more than thirty days prior to the bringing of the suit.

7. That the action in this case is not barred by the Statute of Limitations.

8. That it appears from the testimony in this case that W. C. Marsh and the Manistique Bank represented the defendant company, the assured, and not the insurance company in securing these policies of insurance.

9. That there is no evidence in this case that the said insurance company in any manner solicited or issued the said insurance within this state or did any act with reference to the same which is a violation of the statutes of this state.

10. That the mere fact that the policies of insurance issued to the defendant covered property situated within the State of Michigan is

not a violation of the statutes of this state and is not against the policy of this state.

11. That the statutes of this state do not and could not under the Constitution of the United States prohibit this defendant from going or sending outside of this state and there procuring insurance on property belonging to the defendant and located in this state from an insurance company not authorized to do business in this state.

VIRGIL I. HIXSON,
Attorney for Plaintiff.

Which said several requests the Court refused and thereupon said cause was submitted to the Court and taken under advisement and thereafter and during vacation the following written findings of fact and law were made by the Court and filed:

13 STATE OF MICHIGAN:

In the Circuit Court of the County of Schoolcraft.

JAMES B. SWING, as Trustee for the Creditors of the Union Mutual Fire Insurance Company of Cincinnati, Ohio (Dissolved), Plaintiff,

vs.

THE WESTON LUMBER COMPANY, a Corporation, Defendant.

Findings.

A written request for findings of fact, together with conclusions of law thereon, having been presented and filed by Counsel for the respective parties herein, the Court finds as follows:

Facts.

Plaintiff sues as Trustee for the creditors and policy-holders of the Union Mutual Fire Insurance Company of Cincinnati, Ohio, seeking to collect from defendant, which was a former policy-holder in said company, its share of assessment made by order of the Supreme Court of the State of Ohio, to liquidate said Insurance Company's liabilities.

The Weston Lumber Company, defendant, herein, is, and was during all the time covered by the transactions under consideration, a Michigan corporation, located at Manistique, where it has a saw mill and was engaged in logging in that vicinity and manufacturing lumber at its mill.

In the latter part of the summer of 1889 defendant desired to increase the amount of insurance carried upon lumber accumulated in its yards, and made application to a local agency conducted by a banking institution of the town for a considerable addition to the line of its insurance already held in that agency. Not being able to write, in one risk, in its own companies, the amount of additional

insurance desired, the local agency, through W. C. Marsh, an employee of the bank, who attended to its insurance business, placed twelve different policies with outside agencies. Part of this line of insurance was sent to George R. Lewis & Company, an agency of Minneapolis, Minnesota, through which concern the $5,000.00 insurance involved in this case was placed with the said Union Mutual Fire Insurance Company of Cincinnati, Ohio.

This insurance was written August 30th, 1889, and was carried until December 19th, 1890, when the policy was returned to the plaintiff, and cancelled by him, shortly after he took charge as trustee.

Aside from this transaction there is no evidence that the said insurance company in any manner solicited or issued insurance
14 within this state, or did any act in connection with such business which is in violation of the Statutes of Michigan.

It appears undisputed in this case that the Union Mutual Fire Insurance Company, of Cincinnati, Ohio, was a mutual fire insurance company, incorporated under the laws of Ohio, May 27th, 1887, and was doing business as such during the years 1889 and 1890. It also appears that the laws of the State of Ohio in force during the years 1888, 1889 and 1890, pertaining to mutual fire insurance companies were as set out in plaintiff's declaration in this case.

It is shown by the undisputed testimony in this case that the Supreme Court of the State of Ohio made a decree of assessment against the policy-holders of the Fire Insurance Company, of which this plaintiff is the trustee for the creditors and that such decree is still in force and effect, defining the liability and percentages of assessments for the respective periods of time during which unpaid liabilities of said insurance company were incurred.

According to such decree defendant's proportion of said assessment, in order to pay its just proportion of the unpaid losses and expenses incurred by said Insurance Company during the time defendant held its policy amounts to $537.48.

It is stipulated by counsel for the respective parties in this case, with the same force and effect and validity as if the same had been established on the trial of the case by competent evidence, that the said Union Mutual Fire Insurance Company of Cincinnati, Ohio, is a corporation organized under the laws of the State of Ohio, and that said insurance company has never complied with any of the requirements of the several statutes of the State of Michigan obligated upon insurance companies of other states seeking to transact business in the State of Michigan.

The files, records and exhibits in this case are hereby made a part of these findings.

Conclusions of Law.

There is no evidence in this case to establish the claim that this action is barred by the Statute of Limitations.

The decree of assessment made by the Supreme Court of Ohio would be binding upon the defendant and conclusive in this case,

notwithstanding the fact that the defendant was not served with summons in this action, provided recovery be not barred for other reasons.

Whether or not the witness Marsh was legally the agent of defendant in securing the insurance in question would be a matter for serious consideration if the case turned upon that point. He was an employee of the local insurance agency which had secured a line of insurance from the defendant. The defendant thereafter, on its part, merely applied to this agency in its home town for an increase of isurance, which the agency accepted and proceeded to place as best it could, turning that which it could not care for itself over to other agencies.

15 The selection of this particular insurance company in which to place a portion of its risk, was evidently made in the usual course of business, either by the local agent at Manistique, or George R. Lewis & Co. of Minneapolis, Minnesota, and the details of the application, obtaining the policy, agreeing on the policy, etc. were worked out in the usual course of business by the insurance agency, although accepted and ratified by the defendant. But, so far as the defendant was concerned, its application for insurance was made and this business was done with the home office at Manistique, with which it was in the habit of doing business. The conditions are not to be considered exactly the same as if this defendant had specially selected an outside insurance company in another state, as the one with which it particularly desired to do business, and having done so, had directly applied by correspondence to such company for insurance, but for the disposition of this case, we may assume that Marsh acted as agent of defendant in securing the insurance, and so come directly to the leading contention presented, involving the validity of this contract under the laws of Michigan. It is admitted that the Union Mutual Fire Insurance Company, of Cincinnati, Ohio, never had complied with any of the requirements of the several statutes of this state obligated upon insurance companies of other states who seek to transact business in Michigan. Section 5157 of the Compiled Laws of 1897 provides, "It shall not be lawful for any person or persons, as agent, solicitor, surveyor, broker, or in any other capacity, to transact or to aid in any manner, directly or indirectly, in transacting or soliciting within this state any insurance business for any person, persons, firm or co-partnership, who are non-residents of this state, or for any firm or inland navigation insurance company or association, not incorporated by the laws of this state, or to act for or in behalf of any person or persons, firm or corporation, as agent or broker, or in any other capacity, to procure, or assist to procure a fire or inland marine policy or policies of insurance on property situated in this state, for any non-resident person, persons, firm or co-partnership, or in any company or association without this state, whether incorporated or not, without procuring or receiving from the Commissioner of Insurance the certificate of authority provided for in section 23 of an act, etc., and section 10467 of the Compiled Laws of 1897 provides that when, by the laws of this state, any act is forbidden to be done by any corporation or by any association of

individuals without express authority by law, and such acts shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of such act." These provisions of our Statute, and others of like nature, have been before our Supreme Court from time to time and interpreted with no uncertain sound.

16 A full and able discussion of the subject is found in the case of Seamans *vs.* Temple Co., 105 Mich., p. 401, and other cases there cited. Numerous decisions along the same line are found in other states, in one of which, decided in Pennsylvania, plaintiff himself was a party.—Swing *vs.* Munson, 191 Pa. 582.

Plaintiff admits the force of these decisions, but seeks to distinguish the case at bar, on the ground that the foreign insurance company he represents did not have any agent, broker, inspector or other representative in the State of Michigan, nor solicit, directly or indirectly, this insurance or any other insurance within the state, and did not, in fact, transact any business within the state of Michigan in violation of its Statutes.

While we recognize some difference in the facts shown in these respective cases from those established in the case at bar, we are unable to recognize any distinction in the principles of law involved, in view of the well settled policy of our legislature and decisions dealing with foreign insurance companies. We are not confronted with the question of whether or not this is a valid contract under the laws of the State of Ohio. It may be valid in Ohio and void in Michigan, under our Statutes. Regulating the business of insurance, even to the exclusion of foreign insurance companies from taking any risks in the state under any conditions has been held constitutional. While this may be held to be an Ohio contract, nevertheless, we cannot escape from the fact that it was a contract to insure within the State of Michigan property of a citizen of the state, and was taking an insurance risk in this state.

In the case of the People against Howard, 50 Mich. p. 248, it is said: "The clearly expressed intention of that act was to entirely prevent insurance companies from taking any risks in this state. This was and has been for some time, the settled policy of the state, as appears by legislature, and for the protection of the citizens of the state and companies submitting to our laws and paying the state taxes. The Statute is prohibitory in its character; the policy is wise and as such should be enforced."

The conclusion of the Court is that the contract of insurance under consideration is unlawful and invalid, and there can be no recovery for any assessment upon the policies issued to defendant pursuant to such contract.

Judgment will be entered accordingly.

J. H. STEERE,
Circuit Judge.

Sault Ste. Marie, Mich., July 22, 1904.

Judgment was thereupon entered in accordance with the said findings in favor of said defendant.

Thereafter and within the time prescribed by the rules of the Court therefor, the plaintiff filed exceptions to the said findings of the Court, which exceptions are as follows:

17 STATE OF MICHIGAN:

The Circuit Court for the County of Schoolcraft.

JAMES B. SWING as Trustee for the Creditors and Policy-Holders of the Union Mutual Fire Insurance Company of Cincinnati, Ohio (Dissolved), Plaintiff,

vs.

THE WESTON LUMBER COMPANY, Defendant.

Now comes the above named plaintiff by Virgil I. Hixson, his attorney, and files exceptions to the findings of the Court as follows:

1. The plaintiff excepts to the failure of the Court to find in accordance with his second request for finding as follows: "The undisputed testimony in the case shows that the policies of insurance described in the declaration filed in this suit were issued to and held by the defendant during the respective periods of time and for the agreed annual premium as set out in the declaration."

2. The plaintiff excepts to the failure of the Court to find in accordance with his third request for finding: "That the decree of assessment made by the Supreme Court of Ohio is binding upon the defendant and is conclusive in this case, notwithstanding that the defendant was not served with summons in the action in which said decree of assessment was made."

3. The plaintiff excepts to the failure and refusal of the Court to find in accordance with his fifth request for finding: "That the laws of the State of Ohio in force during the years 1888, and 1889 and 1890 pertaining to mutual insurance companies was as set out in plaintiff's declaration in this case and governs the liability of the defendant in this case."

4. The plaintiff excepts to the refusal and failure of the Court to find in accordance with his sixth request for finding: "That the defendant was duly notified of the said assessment according to law more than thirty days prior to bringing of this suit."

5. The plaintiff excepts to the failure and refusal of the Court to find in accordance with his eighth request for finding, as follows: "That it appears from the testimony in this case that W. C. Marsh and the Manistique Bank represented the defendant company, the assured, and not the insurance company in securing these policies of insurance."

6. The plaintiff excepts to the failure and refusal of the Court to find in accordance with his ninth request for finding, as follows: That there is no evidence in this case that the said insurance company in any manner solicited or issued the said insurance within

this state or did any act with reference to the same which is a violation of the Statutes of this state.

7. The plaintiff excepts to the failure and refusal of the Court to find in accordance with his tenth request for finding, as follows: "That the mere fact that the policies of insurance issued to the defendant covered property situated within the State of Michigan is not a violation of the Statutes of this State and is not against the policy of this state."

8. The plaintiff excepts to the failure and refusal of the Court to find in accordance with his eleventh request for finding, as follows: "That the Statutes of this State do not and could not under the Constitution of the United States prohibit this defendant from going or sending outside of this state and there procuring insurance on property belonging to the defendant and located in this state from an insurance company not authorized to do business in this state."

9. The plaintiff excepts to the findings of the Court that "While we recognize some difference in the facts shown in these respective cases from those established in the case at bar, we are unable to recognize any distinction in the principles of law involved, in view of the well settled policy of our legislature and decisions dealing with foreign insurance companies. We are not confronted with the question of whether or not this is a valid contract under the laws of the State of Ohio. It may be valid in Ohio and void in Michigan, under our Statutes, regulating the business of insurance even to the exclusion of foreign insurance companies from taking any risks in the state under any conditions has been held constitutional."

10. The plaintiff excepts to the finding of the Court that "While this may be held to be an Ohio contract, nevertheless, we cannot escape from the fact that it was a contract to insure within the State of Michigan property of a citizen of the state, and was taking an insurance risk in this state."

11. The plaintiff excepts to the finding of the Court that "The conclusion of the Court is that the contract of insurance under consideration is unlawful and invalid, and there can be no recovery for any assessment upon the policies issued to defendant pursuant to such contract."

12. The plaintiff excepts to the Court's findings of law and facts and to the entry of judgment thereon because the facts found do not support the judgment entered thereon.

13. The plaintiff excepts to the finding of the Court that "But, so far as the defendant was concerned, this application for insurance was made, and the business was done with the home office at Manistique, with which it was in the habit of doing business," because the same is wholly unsupported by the evidence in said cause.

Dated July 25th, 1904.

VIRGIL I. HIXSON,
Attorney for Plaintiff.

The above and foregoing is all of the testimony given in the case and the substance of the proceedings *and* therein and because none

of the exceptions so made and because none of said matters, appear in record of this cause, I have at the request of the said plaintiff, signed this bill of exceptions on this 7th day of October, A. D. 1904 and I further certify my approval of the questions and answers, contained in said bill of exceptions because I deemed them necessary to the proper understanding of the testimony given in the said cause.

J. H. STEERE,
Circuit Judge.

19 *Assignments of Error.*

STATE OF MICHIGAN:

The Circuit Court for the County of Schoolcraft.

JAMES B. SWING, as Trustee for the Creditors and Policy-Holders of the Union Mutual Fire Insurance Company of Cincinnati, Ohio (Dissolved), Plaintiff,

vs.

THE WESTON LUMBER COMPANY, Defendant.

And now comes the above named plaintiff and appellant by Virgil I. Hixson, his attorney, and alleges that in the proceedings and records in the above named cause there is manifest error in this, to-wit:

1. The Court erred in failing to find in accordance with plaintiff's second request for findings.

2. The Court erred in failing and refusing to find in accordance with plaintiff's third request for finding.

3. The Court erred in failing and refusing to find in accordance with plaintiff's fifth request for finding.

4. The Court erred in failing and refusing to find in accordance with plaintiff's sixth request for finding.

5. The Court erred in failing and refusing to find in accordance with plaintiff's eighth request for finding, as follows: "That it appears from the testimony in this case that W. C. Marsh and the Manistique Bank represented the defendant company, the assured, and not the insurance company in securing these policies of insurance."

6. The Court erred in failing and refusing to find in accordance with plaintiff's ninth request for finding, as follows: "That there is no evidence in this case that the said insurance company in any manner solicited or issued the said insurance within this state or did any act with reference to the same which is a violation of the Statutes of this state."

7. The Court erred in failing and refusing to find according with plaintiff's tenth request for finding, as follows: "That the mere fact that the policies of insurance issued to the defendant covered property situated within the state of Michigan is not a violation of the Statutes of this state, and is not against the policy of this state."

8. The Court erred in failing and refusing to find according to plaintiff's eleventh request for finding, as follows: "That the Statutes of this state do not and could not, under the constitution of the United States, prohibit this defendant from going or sending outside of this state and there procuring insurance on property belonging to the defendant and located in this state, from an insurance company not authorized to do business in this state."

9. The Court erred in the following finding: "While we recognize some difference in the facts, shown in these respective cases from those established in the case at bar, we are unable to recognize any distinction in the principles of law involved, in view of the well settled policy of our legislature and decisions dealing with foreign insurance company. We are not confronted with the question of whether or not this is a valid contract under the laws of the state of Ohio. It may be valid in Ohio and void in Michigan, under our Statutes. Regulating the business of insurance, even to the exclusion of foreign insurance companies from taking the risks in the state under any conditions has been held constitutional."

10. The Court erred in finding, as follows: "While this may be held to be an Ohio contract, nevertheless, we cannot escape from the fact that it was a contract to insure within the State of Michigan property of a citizen of the state, and was taking an insurance risk in this state."

11. The Court erred in finding, "The conclusion of the Court is that the contract of insurance under consideration is unlawful and invalid, and there can be no recovery for any assessment upon the policies issued to defendant pursuant to such contract."

12. The Court erred in the entry of judgment in favor of the defendant upon the facts found, because the facts found do not support the judgment entered thereon."

13. The Court erred in finding, as follows: "But, so far as the defendant is concerned, this application for insurance was made, and its business was done with the home office at Manistique, with which it was in the habit of doing business," because the same is wholly unsupported by the evidence in said cause.

VIRGIL I. HIXSON,
Attorney for Plaintiff and Appellant.

PLAINTIFF'S EXHIBITS.

EXHIBIT "A."

This exhibit is in the language set forth in plaintiff's declaration, beginning at bottom of page 4 and concluding at bottom of page 6 of this record.

EXHIBIT "B."

Know all Men by these presents: That we, the undersigned, James C. Richardson of Glendale, O., Harry P. Piper of Cincinnati, O., William J. Breed of Cincinnati, O., Alfred Simpkinson of Cincin-

nati, O., J. F. Meyer of Cincinnati, O., Charles G. Mitchell of Cincinnati, O., Howard Ferris of Linwood, O., H. H. Lippelmann of Glendale, O., and Edward H. Williams of Dayton, O., citizens of the State of Ohio, being desirous of becoming incorporated, do hereby associate ourselves to form a body corporate and do execute these articles of incorporation and agree as follows:

1st. The name of the said corporation shall be "The Union Mutual Fire Insurance Company."

2nd. Said corporation shall be located and its principal business transacted at Cincinnati, Ohio.

3. The purpose for which said corporation is formed is to make insurance against loss or damage to its members by fire or lightning, in and out of the State of Ohio, on mills or factories and their accessories, such as elevators, warehouses, lumber yards and their contents and other property, real or personal, forming a part of such manufacturing property, and to provide for the payment of losses and incidental expenses by assessments on its members.

21 4th. The capital stock of said company shall be Two Hundred Thousand Dollars, to-wit: One Hundred and Sixty Thousand Dollars in premium notes and Forty Thousand Dollars in cash.

In witness whereof we have hereunto set our hands, this twenty-seventh day of May, 1887.

JAMES C. RICHARDSON.
H. P. PIPER.
WM. J. BREED.
ALFRED SIMPKINSON.
J. F. MEYER.
CHAS. G. MITCHELL.
HOWARD FERRIS.
H. LIPPELMANN.
EDWR. WILLIAMS.

Attest:
H. C. HEALEY,
D. F. PFAU.

STATE OF OHIO, *Hamilton County, ss:*

Personally appeared before me, a Notary Public in and for said county, the above named, James C. Richardson, Harry P. Piper, William J. Breed, Alfred Simpkinson, J. F. Meyer, Charles G. Mitchell, Howard Ferris, H. Lippelmann and Edward Williams, who severally acknowledged the signing of the above articles of incorporation to be their free act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal at Cincinnati, O., this twenty-seventh day of May, 1887.

[SEAL.] HERBERT C. HEALEY,
Notary Public.

THE STATE OF OHIO, *Hamilton County, ss:*

I, Daniel J. Dalton, clerk of the court of common pleas, a court of record for the county and state aforesaid, do hereby certify that it appears of record in this office that Herbert C. Healey, whose name is subscribed to the annexed instrument, was at the time of taking such proof, or acknowledgment, a notary public in and for said county, duly commissioned and qualified, and duly authorized to administer oaths, to take acknowledgment of deeds, etc.

And further, that I am well acquainted with the hand-writing of said Herbert C. Healey and verily believe that the signature to the said certificate, or proof of acknowledgment, is genuine.

In testimony wherof, I have hereunto set my hand, and affixed the seal of said court, at Cincinnati, this 27th day of May, A. D. 1887.

[SEAL.] DANIEL J. DALTON, *Clerk.*
By W. H. SARGENT, *Dep.*

Having examined the within articles of incorporation I am of opinion that the same is in conformity with the law of this state and I therefore approve the same.

J. A. KOHLER,
Attorney General.

June 1, 1887.

UNITED STATES OF AMERICA,
State of Ohio, Office of the Secretary of State:

22 I, Lewis C. Laylin, secretary of state of the State of Ohio, and being the officer who, under the Constitution and Laws of said State, is duly constituted the keeper of the records of articles of incorporation of all companies incorporated under the laws thereof, and the records of all papers relating to the creation of said incorporated companies, and empowered to authenticate exemplifications of the same, do hereby certify that the annexed instrument is an exemplified copy, carefully compared by me with the original record now in my official custody as secretary of state, and found to be true and correct, of the articles of incorporation of "The Union Mutual Fire Insurance Company," filed in this office on the 1st day of June, A. D. 1887, and recorded in volume 40, page 289, of the Records of Incorporations; that said exemplification is in due form and made by me as the proper officer, and is entitled to have full faith and credit given it in every court and office within the United States. In testimony whereof, I have hereunto attached my official signature and the Great Seal of the State of Ohio, at Columbus, this 8th day of February, A. D. 1904.

LEWIS C. LAYLIN,
[GREAT SEAL.] *Secretary of State.*

EXHIBIT "C."

This exhibit is in the language set forth in Plaintiff's declaration

EXHIBIT "1."

Rotation No.	Policy No.	Assured.	S. R. fo.	Class of hazard.	Stat. Rec. fo.	P. O. Address.	State.	Agent or broker.	C. Acc. fo.	Term.	Date of policy.	Expiration of policy.	Amount insured.	Assessible basis.	Cash premium.
2250	3078	Weston Lumber Co..	13	Lumber yards..... 50	3-43	Manistique.	Mich.	Geo. R. L. "M" *	161	1	Sept. 1	Sept. 1, 90	5000	625	1⅛
	07813	.....	.....	Expired Sept. 1, 90	.....	.....	.....	.....	.....	.....	.....	.....	.....	93.75	18.75
4387	5207	Weston Lumber Co..	21	Lumber yards.....	.....	Manistique.	Mich.	Geo. R. Lewis....	299	1	Sept. 1	Sept. 1, 91	5000	625	125
	3078	.....	.....	50	3-42										
	04180	.....	12-19	Cancelled by order of J. B. Swing, Trustee.											

* Rate increased on No. 2640.

EXHIBIT No. "2."

Union Mutual Fire Insurance Company of Cincinnati, Ohio. Cincinnati, O., August 30, 1889. This certifies that Weston Lumber Company of Manistique, Mich., has made application to this company for insurance upon their property to the amount of $5,000 and that the same has been approved and accepted by the state agents for the State of Minnesota of the said company, (Subject to approval of the said company at their office in Cincinnati, Ohio) and the same is hereby insured from this date to the first day of September, 1889, (Unless otherwise notified to the contrary), subject to all the terms, conditions and stipulations of the policy of this company, insuring said property, to bear date of said first day of September, 1889, to be issued to said party upon said application.

W. J. BREED, *Pres't.*
ED. H. WILLIAMS, *Sec'y.*

Not valid unless countersigned by G. R. Lewis & Co., state agents for Minnesota, at Minneapolis.

G. R. LEWIS & CO., *Agents.*

23 EXHIBIT No. "3."

Geo. R. Lewis & Co. Agency, Fire Insurance, 308 Bank of Commerce, Minneapolis, Minn. Policy No. 07813. Renewal No. —. Daily report for the Union Mutual Fire Insurance Company, of Cincinnati, Ohio, of insurance made by — agent, this — day of ——, 188-.

Commencement of risk.	Term.	Expiration of risk.	Rate.	Board rate.	Amount insured.	Premium.
Aug. 30, 1889	1 y'r.	Aug. 30, '90	.....	2½	5000.00	125.00

Issued to Weston Lumber Co., of Manistique, Mich.

The cash value of the property hereby insured is $—. Now insured, including this policy, for $—. Geo. R. Lewis & Co., Fire Insurance, 308 Bank of Commerce, Minneapolis, Minn., Agent.

EXHIBIT No. "4."

Application of Weston Lumber Co. of Manistique, county of —, State of Mich., for insurance in the Union Mutual Fire Insurance Company, of Cincinnati, Cincinnati, O., in the sum of Five Thousand Dollars, against loss or damage by fire and lightning on the

property below specified, for the term of 1 year from the 1st day of September, 1889, to-wit:

EXHIBIT No. "5."

Michigan Standard Policy—Lumber Clause.

On lumber, lath, shingles and pickets owned by the assured, or sold but not delivered, piled on the docks and yards of the Chicago Lumbering Company and the Weston Lumber Company, near the mouth of the Manistique River, in the Village of Manistique, Mich.

Space Clause—Warranted by the Assured that a continuous clear space of 200 feet shall hereafter be maintained between the property hereby insured and any wood working or manufacturing establishment, and that said space shall not be used for handling or piling of lumber thereon for temporary purposes, tramways upon which lumber is not piled, alone being excepted. But this shall not be construc*t*ed to prohibit loading or unloading within, or the transportation of lumber or timber products across such clear space; it being specially understood and agreed by the Assured that any violation of this warranty shall render this policy null and void.

Four-fifths Clause—It is part of the consideration of this policy and the basis upon which the rate or premium is fixed, that the Assured shall maintain insurance on the property hereby insured by this policy, to the extent of four-fifths of the actual cash value thereof, and that failing so to do, the Assured shall be co-insurer to the extent of such deficit, and in that event shall bear its proportion of any loss. It is, however, mutually understood and agreed that in case the total insurance shall exceed four-fifths of the whole actual cash value of the property insured by this policy, the Assured shall not recover from this Company more than its pro-rata share of four-fifths of the whole actual cash value of such property.

Attached to and forming part of the policy No. 08180.

GEO. R. LEWIS & CO.,
Gen. Agts.

24 EXHIBIT No. "6."

Geo. R. Lewis & Co. Agency, Fire Insurance, 308 Bank of Commerce, Minneapolis, Minn. Policy No. 08180. Renewal of No. 07813. Daily report for the Union Mutual Fire Insurance Company, of Cincinnati, Ohio, of insurance made by G. R. Lewis & Co., Fire Insurance, 308 Bank of Commerce, Minneapolis, Minn., Agent, this 1st day of Sept., 1889.

Commencement of risk.	Term.	Expiration of risk.	Rate	Board rate.	Amount insured.	Premium.
Sept. 1st, 1890.	1 y'r.	Sept. 1, '91.	2½	....	5,000.00	125.00

Issued to Weston Lumber Co., of Manistique, Mich.

The cash value of the property hereby insured is $—. Now insured, including this policy, for $—. Geo. R. Lewis & Co., Fire Insurance, 308 Bank of Commerce, Minneapolis, Minn., Agent.

EXHIBIT No. "7."

Application of Weston Lumber Co. of Manistique, county of —, State of Mich., for insurance in the Union Mutual Fire Insurance Company, of Cincinnati, O., in the sum of Five Thousand Dollars, against loss or damage by fire and lighting on the property below specified, for the term of 1 yea- from the 1st day of September, 1890, to-wit:

EXHIBIT No. "8."

Michigan Standard Policy—Lumber Clause.

On lumber, lath, shingles and pickets owned by the assured, or sold but not delivered, piled on the docks and yards of the Chicago Lumbering Company and the Weston Lumber Company, near the mouth of the Manistique River, in the Village of Manistique, Mich.

Space Clause.—Warranted by the Assured that a continuous clear space of 200 feet shall hereafter be maintained between the property hereby insured and any wood working or manufacturing establishment, and that said space shall not be used for handling or piling of lumber thereon for temporary purposes, tramways upon which lumber is not piled, alone being excepted. But this shall not be constructed to prohibit loading or unloading within, or the transportation of lumber or timber products across such clear space; it being specially understood and agreed by the Assured that any violation of this warranty shall render this policy null and void.

Four-fifths Clause.—It is part of the consideration of this policy and the basis upon which the rate of premium is fixed, that the Assured shall maintain insurance on the property hereby insured by this policy, to the extent of four-fifths of the actual cash value thereof, and that failing so to do, the Assured shall be co-insurer to the extent of such deficit, and in that event shall bear its proportion of any loss. It is, however, mutually understood and agreed that in case the total insurance shall exceed four-fifths of the whole actual cash value of the property insured by this policy, the Assured shall not recover from this Company more than its pro-rata share of four-fifths of the whole actual cash value of such property.

Attached to and forming part of the policy No. 08180.

GEO. R. LEWIS & CO.,
Gen. Agts.

25 EXHIBIT No. "9."

Short Term Participating Policy. No. 08180. $5,000.00.

The Union Mutual Fire Insurance Company of Cincinnati, O. In consideration of the conditions and stipulations herein named, and of the deposit of One Hundred Twenty-five dollars, in ac-ord-

ance with the by-laws and regulations of the company, does insure Weston Lumber Company, of Manistique, Michigan, to the amount of Five Thousand Dollars, from 12 o'clock at noon on the first day of September, 1890, to 12 o'clock at noon on the first day of September, 1891, subject to the following terms and conditions: Against loss or damage by fire and lightning to the following specified and located property only, to-wit:

Payments and Dividends.—It is agreed that if the assured shall refuse or neglect to make the cash payment above specified on or before the twenty-fifth day of the month in which this policy is issued, then this company shall not be liable in case of loss under this policy, until such payment is made; but in no case will this company be liable for a loss occuring during suspension, whether payment be subsequently made or not. The insured under this policy shall be entitled in case this policy shall be continued in force for one year, or in case of cancellation by this company, to receive in cash a proportionate share of the profits of the company during the time said policy shall have been in force, in accordance with the by-laws of this company, but cancellation by the insured shall in no case impair the right of this company to recover any existing claim on the agreement entered into between this company and the insured; and shall forfeit all claims to dividends. This company reserves the right in any case where the insurance shall have been procured through any broker or person other than the insured except a regularly commissioned agent or salaried employee of this company, to deduct from the amount of said dividend, the amount of any commission or brokerage that may have been paid to said person; also to deduct from the amount of said dividend the pro-rata premium for such number of days as the within described property may have been insured under the Binding Receipt of this company, previous to the issue of this policy; also if any portion of this policy is re-insured in any other company, then that portion re-insured shall not participate in the profits of this company.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable ninety days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional however, with this company to take all, or any part,
26 of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost with other of like kind or quality within a reasonable time on giving notice, within

thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured: or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in a fee simple; or if the subject or insurance be personal property and be or become encumbered by a chattel mortgage; or, if with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy, by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss, or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder, exceeding twenty-five pounds in quantity, naptha, nitro-glycerine, or other explosives, phosphorus or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light): or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

27 This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority, or by theft, or neglect of the insured to use all reason-

able means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as a result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, store or office furniture or fixtures, sculpture, fixtures, tools, or property held on storage or for repairs; nor beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulatng construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the property described.

If an application, survey, plan or description of property be referred to in this policy, it shall be a part of this contract and a warranty to the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may, by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

28 If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location,

such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession or exposure of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public, (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be desig-
29 nated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively

selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

30 The By-Laws of this Company hereto annexed, so far as they do not conflict with the term and affect any of the provisions or conditions hereinbefore contained in this policy, are hereby declared to be and form a part of this policy, and are to be resorted to in order to determine the rights and obligations of the parties hereto.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agree-

ment indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

In witness whereof, The Union Mutual Fire Insurance Company, of Cincinnati, Ohio, have caused these presents to be signed by their president and attested by their secretary at the City of Cincinnati, Ohio, this first day of September, 1890.

(Signed) W. J. BREED, *President.*
(Signed) ED. H. WILLIAMS, *Secretary.*

Not valid unless countersigned by Geo. R. Lewis & Co., state agents for Minnesota and Wisconsin at Minneapolis, Minn.

GEO. R. LEWIS & CO., *State Agents.*

(Copy.)

EXHIBIT No. "10."

This exhibit is duplicate of Exhibit "8."

EXHIBIT No. "11."

Therefore, under and by virtue of the foregoing decree of the Supreme Court of Ohio, and by virtue of the authority vested by law in the undersigned as Trustee of said Company, notice is hereby given that the contingent liability and premium notes of Weston Lumber Co., Manistique, Schoolcraft Co., Michigan, for $625, for No. 3078 for $5,000, from Sept. 1, '89 to Sept. 1, '90; and for $625, for No. 5207 for $5,000, from Sept. 1, '90 to Dec. 19, '90, are assessed:

In said	2d	qr.	3.5825	per cent. of	$625,	that is $22.39
"	3d	"	4.8248	"	"	" 30.15
"	4th	"	7.0194	"	"	" 43.87
"	5th	"	1.8358	"	"	" 11.47
"	6th	"	28.0095	"	"	" 175.05
"	7th	"	40.7289	"	"	" 254.55

So that the total amount due from you is..... $537.48

31 This you are required by law to pay within 30 days from this date, viz: March 10, 1903.

By the authority of the Supreme Court of the State of Ohio, as shown in lines No. 17 to 21, of the above decree, the full one-third of the above amount will be rebated and a receipt given against all future liability as a policy-holder in said Company, providing this assessment is paid before suit is brought against you by the undersigned Trustee.

No second notice will be sent to those who receive this notice and this notice is sent by registered mail, in order to be sure it is received.

Respectfully yours, JAMES B. SWING,
Trustee of The Union Mutual Fire Ins. Co. of Cincinnati, Ohio.

For further information address
PATTERSON A. REECE,
Att'y, No. 507 Johnson Building, Fountain Square, Cincinnati, Ohio.

Duplicate.

Schedule of Liabilities, Exclusive of Interest and Cost of Collection.

Creditors.	Address.	Amount.
Harlem Lighting Co.,	New York, N. Y.	$2,920 36
Edgerton Milling Co.,	Edgerton, O.	1,961 29
A. Del Pino & Bro.,	Key West, Fla.	2,883 27
Henry Gill,	Hillsboro, N. D.	968 32
Thomas C. Fisher,	Anderson, Ind.	4,000 00
B. Steinberg & Co.,	New York., N. Y.	243 85
Wm. Schoen,	Winterset, Iowa	900 00
S. Robbins Paper Co.,	Middleton, O.	3,165 75
C. H. Plummer,	Jackson, Mich.	2,313 66
Isaac Thalman,	Indianapolis, Ind.	1,720 05
Ashland Mill Co.,	Ashland, Mo.	2,000 00
John W. Owens,	Reilly, Ohio	528 72
Michigan Shingle Co.,	Muskegon, Mich.	1,000 00
O. H. Peckham Candy Co.,	St. Louis, Mo.	2,500 00
Parr M'f'g Co.,	Barron, Wis.	3,000 00
Menominee Riv. Sash Co.,	Marinette, Wis.	1,317 03
Eddy Bros. & Co.,	Duluth, Minn.	1,014 23
Columbia Rubber Co.,	E. Braintree, Mass.	1,000 00
Bering & Co.,	Cincinnati, Ohio.	1,000 00
Cherry-Morrow Co.,	Nashville, Tenn.	3,241 03
Cincinnati Dessic-ating Co.,	Cin., O.	1,751 92
Tampa Lumber Co.,	Tampa, Fla.	981 40
Gast Litho. Co.,	New York, N. Y.	1,129 46
Wm. Elliot Smith,	Alton, Ill.	3,225 12
J. H. Day & Co.,	Cincinnati, O.	14 29
Hewes & Willworth,	Kilkenney, Minn.	1,800 00
Greenville W. Mills,	Greenville, Tenn.	3,000 00
Newton Lumber Co.,	Pueblo, Col.	13 00
Bucket Pump Co.,	Cincinnati, O.	65 73
Thayer & Gilmore,	Iola, Kansas	2,000 00
Indianapolis Chair Co.,	Ind'p'l's, Ind.	30 46
S. X. Metzger & Son,	Elmira, N. Y.	4,407 45
Wm. Denmuth & Co.,	New York, N. Y.	200 00
H. M. Healy,	Cincinnati, O.	6 00

Ira Cadwallader, Fostoria, O.	1,114	91
Central M. Ins. Co., Cincinnati, O.	3,302	48
Consolidated M. Ins. Co., Cincinnati, O.	50	24
Niagara Falls M. F. Ins. Co., Niagara, N. Y.	174	00
Capital City M. F. Ins. Co., Columbus, O.	36	00
Merchants' M. F. Ins. Co., Cincinnati, O.	16	00
M'f'rs M. F. Ins. Co., Akron, O.	17	50
National M. F. Ins. Co., Akron, O.	7	50
Farmer's Ins. Co., Columbus, O.	10	00
Wrightson Printing Co., Cincinnati, O.	137	14
Cincinnati Litho. Co., Cincinnati, O.	102	00
Wickoff, Seamans & Benedict, Cincinnati	3	65
H. F. West & Bro. Co., Cincinnati, O.	4	00
Sanborn Ferris Map Co., Cincinnati, O.	25	00
Wm. F. Cressler, Cincinnati, O.		45
H. M. Healy, Cincinnati, O.	13	06
32 H. Kuhlman & Son, Cincinnati, O.	6	00
The Spectator Co., Cincinnati, O.	1	00
R. G. Dunn & Co., Cincinnati, O.	38	66
J. H. Gray, Cincinnati, O.	27	00
Strobridge Litho. Co., Cincinnati, O.	7	50
S. E. Hills, Cincinnati, O.	1,630	77
B. F. Perrine, Cincinnati, O.	200	00
N. G. Elber, Cincinnati, O.	62	50
Enterprise Insurance Co., Cincinnati, O.	37	36
Samuel Hotchkiss, Cincinnati, O.	76	00
Wm. J. Breed, Cincinnati, O.	450	00
H. P. Piper, Cincinnati, O.	375	00
J. C. Richardson, Cincinnati, O.	300	00
Howard Ferris, Cincinnati, O.	300	00
H. H. Lippelman, Cincinnati, O.	300	90
A. Simpkinson, Cincinnati, O.	300	00
C. S. Douglass, Cincinnati, O.	147	70
Ferris & Swing, Cincinnati, O.	500	00
J. K. Reeve, Cincinnati, O.	41	70
P. H. Fielding, Cincinnati, O.	100	00
E. H. Williams, Cincinnati, O.	200	00
F. M. McCord, Cincinnati, O.	100	00
J. W. Flanagan, Cincinnati, O.	37	00
Miss McCallum, Cincinnati, O.	45	00
Miss Richards, Cincinnati, O.	12	00
Miss Mathie, Cincinnati, O.	25	00
Chas. Benninger, Cincinnati, O.	18	00
A. Heckert, Cincinnati, O.	15	00
L. Blair, Cincinnati, O.	20	00
H. Jonke, Cincinnati, O.	35	00
J. Williams, Cincinnati, O.	5	00

Liabilities of Members of Mutual Companies to Assessment.

Section 3650 of the Revised Statutes of Ohio provides: "Every "person who effects insurance in a Mutual Company, and continues "to be insured, and his heirs, executors, administrators and as- "signs, shall thereby become members of the Company during the "period of insurance, shall be bound to pay for losses, and such "necessary expenses as accrue in and to the company in propor- "tion to the original amount of his deposit note or contingent "liability; and the directors shall, as often as they deem necessary, "settle and determine the sum to be paid by the several members "thereof, and publish the same in what manner they may choose, "or as the By-laws prescribe, and the sum to be paid by each "member shall always be in proportion to the original amount "of such liability, and shall be paid to the officers of said Com- "pany within thirty days next after the publication of such notice."

Section 3651 of the Revised Statutes of Ohio provides: "If a mem- "ber neglect or refuse, for the space of 30 days after the publi- "cation of such notice and after demand for payment, to pay "the sum assessed upon him in (as his) proportion of any loss as "aforesaid, the Directors may sue for and recover the whole amount "of contingent liability with cost of suit."

Notice of assessment decreed by Court on persons who were policy holders of the Mutual Fire Insurance Company of Cincinnati, Ohio. At the January term A. D. 1901 of the Supreme Court of Ohio, held at Columbus, Ohio, on the 11th day of June, 1901, the following judgment and decree of the Court was made, to-wit:

In the Supreme Court of Ohio.

No. 2541.

STATE OF OHIO *ex Rel.* THE ATTORNEY GENERAL, Plaintiff,
vs.
THE UNION MUTUAL FIRE INSURANCE CO. OF CINCINNATI, OHIO,
Defendant.

Decree of Assessment.

33 This cause coming on to be heard upon the motion of James B. Swing, Trustee herein, to confirm the report of Malcolm G. Davis, the Referee heretofore appointed and qualified herein, and it appearing to the Court that due and sufficient notice by publication has been made by said Referee of the taking of the testimony embodied in his report, and that he has proceeded in all respects in accordance with law, and that this Court has full jurisdiction of the subject matter and of said The Union Mutual Fire Insurance Company, of Cincinnati, Ohio, the Court, in consideration of all the evidence and of the schedules and representations set forth in said report, and upon the arguments of counsel, this

Court being fully advised in the premises, doth find that said Insurance Co., at the time it ceased to do business, Dec, 18th, 1890, was insolvent and unable to pay its debts and that it is necessary to make an assessment on all persons who are liable for its debts, to pay the fire losses and other liabilities of said Company, together with interest thereon, and the reasonable expense of winding up the affairs of said Company in accordance with law.

And this Court finds that the unpaid liabilities of said Company were incurred on and between April 25th, 1889, and Dec. 18th, 1890, and that all persons who held policies of insurance in said Company on their property during the time the unpaid liabilities of said Company were incurred, are liable for their just proportion of said liabilities with interest thereon, together with the expense of winding up the affairs of said Company, including the expenses of litigation with such of them as do not pay this assessment without suit. And the Court finds that said expense of litigation will be one-third of the amount of the litigated assessments. And this Court therefore orders; that as to all persons who, without being sued for them, pay their respective assessments levied against them in accordance with this decree, the Trustee appointed herein shall rebate to them the full one-third part of their respective assessments, and shall receipt in full to and release such persons from all further liability as policy holders of said Insurance Company. And said Trustee is hereby given full power and is ordered to sue for and collect the full assessments made in accordance herewith, without rebate, when 30 days have elapsed after due notice thereof has been given to the respective policy holders. And the Trustee shall sue for all money due said Company, and not paid upon due demand therefor, and shall settle, adjust pay and discharge all debts and liabilities due from said Company; incur and pay all the necessary expenses in the performance of said trust and do all things necessary to properly and legally wind up the affairs and business of said Insurance Co. according to law.

34 Any surplus remaining shall be returned pro rata to all members paying their assessments without litigation. In all cases where persons were policy holders of said Company and where no note was given, such persons shall be liable to assessment on a basis of five times their annual premium, just as if they had given notes, and in all cases where the premium notes had been returned to the makers thereof without payment of the losses and expenses chargeable thereto in accordance with the assessments therein determined, such persons shall be liable to this assessment just as if such notes had not been returned. Said Trustee is authorized to compromise the assessments of persons who appear to be insolvent for such sum as he deems proper. Payments made to the said Trustee prior to this date for assessment liability to said Company, shall be credited on this assessment to the respective persons paying same. And it is hereby decreed that the following assessments shall be made against all persons who hold policies of insurance in said Company on and between April 25th, 1889, and

Dec. 18th, 1890, as follows, to-wit: (The assessments made are duplicates of those appearing on pages 5 and 6 of this Record.)

EXHIBIT No. "12."

19448. Received from the Post Master at Manistique, Mich., Registered letter No. —. From Postoffice at Cincinnati, Ohio., addressed to (Signature or name of addressee) Weston Lumber Co., (Signature of addressee'- agent) Earl Winn. When delivery is made to an agent of the addressee, both addressee'- name and agent's signature must appear in the receipt. A registered article must not be delivered to anyone but the addressee, except on addressee's written order. When the above receipt has been properly signed, it must be post marked with name of delivering office and actual date of delivery and mailed to its address without envelope or postage.

This card must be neatly and correctly made up and addressed at the post office where the article is registered. The post master who delivered the registered article must see that this card is properly signed, post marked and mailed to the sender. (Post mark of delivery office and date of delivery) Manistique, Mich., Mar. 13, 1903, 6 p. m. (Post mark of sending office,) Cincinnati, O., Mar. 10, 1903, 10 p. m. Post Office Department—Official Business—Penalty of $300 for private use. Return to Patterson A. Reece, Att'y, Cincinnati.

EXHIBIT "D."

This exhibit is duplicate of Exhibit 11.

PLAINTIFF'S EXHIBIT "E."

MANISTIQUE, MICH., *Apr.* 16, 1891.

To James B. Swing, Trustee, Cincinnati, Ohio.

DEAR SIR: Please return our receipt of Mr. C. H. Spencer, referred to in your favor of March 17th, and greatly oblige. We need it at once, and a sworn copy of same, would, no doubt, answer your purpose.

Yours very truly, W. C. MARSH, *Cashier.*

35 PLAINTIFF'S EXHIBIT "F."

MANISTIQUE, MICH., *Apr.* 25, 1891.

To James B. Swing, Cincinnati, Ohio.

DEAR SIR: We acknowledge receipt of your favor of the 22nd enclosing C. H. Spencer insurance receipt.

Yours very truly, W. C. MARSH, *Cashier.*

PLAINTIFF'S EXHIBIT "G."

MANISTIQUE, MICH., *Mar. 12th,* 1891.

To Mr. James B. Swing, Trs., Cincinnati, Ohio.

DEAR SIR: As requested in your favor of March 3rd, we now enclose you receipt C. H. Spencer for payment of premium $125.00 on Union Mutual Fire Insurance Co. Policy No. 08180. After inspecting this receipt, kindly return it to me. As you will notice, it cover- many other policies.

Yours respectfully, W. C. MARSH.

PLAINTIFF'S EXHIBIT "H."

James B. Swing, Trustee of The Union Mutual Fire Insurance Co.,
82 W. Third Street.

CINCINNATI, OHIO, *February 22d,* 1891.

Weston Lumber Co., Manistique, Mich.

DEAR SIR: Some days since I wrote you asking you to favor me with the necessary information as to the payment by you of the premium on Policy No. 08180 of the Union Mutual Fire Insurance Company amounting to $125.00 which appears upon the books of the Company as unpaid by you.

It is important that I have this information as early as possible in order to expedite the closing of the Company's affairs.

Will you kindly favor me with your prompt reply, and oblige,

Truly yours, JAMES B. SWING, *Trustee.*

The premium on the above policy was paid by the Weston Lumber Co. to W. C. Marsh of the Manistique Bank and he paid it over to C. H. Spencer then of Minneapolis and now of Chicago. We supposed he settled with you.

Please address all letters relative to insurance to W. C. Marsh, Manistique, Mich.

36 DEFENDANT'S EXHIBIT No. "1."

STATE OF MICHIGAN:

The Circuit Court for the County of Schoolcraft.

JAMES B. SWING, as Trustee for the Creditors and Policy-Holders of The Union Mutual Fire Insurance Company of Cincinnati, Ohio, (Dissolved), Plaintiff,

vs.

THE WESTON LUMBER COMPANY, Defendant.

It is hereby agreed by and between the plaintiff and defendant in the above entitled cause, that the following facts are admitted

with the force and effect and validity as if the same had been established upon the trial of the cause by competent evidence, That the Union Mutual Fire Insurance Company of Cincinnati, Ohio, is a corporation organized under the laws of the State of Ohio, and that said Insurance Company has never complied with any of the requirements of the several statutes of the State of Michigan obligatory upon insurance companies of other states seeking to transact business in the State of Michigan.

Dated April 11th, A. D. 1904.

VIRGIL I. HIXSON,
Attorney for Plaintiff.
C. W. DUNTON,
Attorney for Defendant.

This cause was subsequently, and on the 15th day of October, 1904, removed to the Supreme Court of the State of Michigan, by writ of error, where the following proceedings were had:

37 At a Session of the Supreme Court of the State of Michigan. Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fifth day of April in the year of our Lord one thousand nine hundred and five.

Present: The Honorable Joseph B. Moore, Chief Justice, William L. Carpenter, Aaron V. McAlvay, Claudius B. Grant, Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Associate Justices.

No. 20780.

JAMES B. SWING, Trustee, Plaintiff,
vs.
THE WESTON LUMBER COMPANY, Defendant.

This cause coming on to be heard is argued by Mr. Reece for the plaintiff and submitted on brief on the part of the defendant.

38 *Opinion.*

Supreme Court of Michigan.

JAMES B. SWING, Trustee, Plaintiff & Appellant,
vs.
THE WESTON LUMBER COMPANY, Def't & Appellee.

Before Carpenter, McAlvay, Grant, Montgomery, Hooker, JJ.

MCALVAY, *J.:*

The plaintiff, trustee of the Union Mutual Fire Insurance Company of Cincinnati (dissolved), brought an action against the defendant, a Michigan Corporation, for the amount of an assessment

in accordance with a decree of the Supreme Court of Ohio in winding up said insolvent insurance company. The said Union Mutual Fire Insurance Company was duly organized under the laws of the State of Ohio and was never licensed to do business in Michigan.

The defendant is a Michigan Corporation and the insurance was upon defendant's lumber and other property at Manistique in this State, under a policy dated August 30, 1889, and a renewal thereof, and was carried until December 19, 1890, for the sum of $5,000. The amount of the assessment sued for was the sum of $537.48.

The substantial defense set up under the plea was that the said Insurance Company was a foreign corporation not authorized to transact business in the State of Michigan, and that the insurance policies were issued in direct violation of the laws of Michigan, said Insurance Company not having complied with the statutes of this State relative to foreign insurance companies doing business
39 therein, and that said contracts of insurance were at variance with, and contrary to the settled policy of this State.

The case was tried before the Court without a jury, and written findings of fact and conclusions of law having been requested, the same were made and filed as follows:

"Facts.

Plaintiff sues as Trustee for the creditors and policy-holders of the Union Mutual Fire Insurance Company of Cincinnati, Ohio, seeking to collect from defendant, which was a former policy holder in said company, its share of assessment made by the order of the Supreme Court of Ohio, to liquidate said Insurance Company's liabilities.

The Weston Lumber Company, defendant herein, is and was during all the time covered by the transactions under consideration, a Michigan corporation, located at Manistique, where it has a saw mill and was engaged in logging in that vicinity and manufacturing lumber at its mill.

In the latter part of the summer of 1889 defendant desired to increase the amount of insurance carried upon lumber accumulated in its yards, and made application to a local agency conducted by a banking institution of the town for a considerable addition to the line of its insurance already held in that agency. Not being able to write, in one risk, in its own companies, the amount of additional insurance desired, the local agency, through W. C. Marsh, an employee of the bank, who attended to its insurance business, placed twelve different policies with outside agencies. Part of this line of insurance was sent to George R. Lewis & Company, an agency of Minneapolis, Minnesota, through which concern the $5,000.00 insurance involved in this case was placed with the said Union Mutual Fire Insurance Company of Cincinnati, Ohio.

This insurance was written August 30th, 1889, and was carried until December 19th, 1890, when the policy was returned to the plaintiff, and cancelled by him, shortly after he took charge as trustee.

40 Aside from this transaction there is no evidence that the said insurance company in any manner solicited or issued insur-

ance within this state, or did any act in connection with such business which is in violation of the Statutes of Michigan.

It appears undisputed in this case that the Union Mutual Fire Insurance Company, of Cincinnati, Ohio, was a mutual fire insurance company, incorporated under the laws of Ohio, May 27th, 1887, and was doing business as such during the years 1889 and 1890. It also appears that the laws of the State of Ohio in force during the years 1888, 1889 and 1890, pertaining to mutual fire insurance companies were as set out in plaintiff's declaration in this case.

It is shown by the undisputed testimony in this case that the Supreme Court of the State of Ohio made a decree of assessment against the policy-holders of the Fire Insurance Company, of which this plaintiff is the trustee for the creditors and that such decree is still in force and effect, defining the liability and percentages of assessments for the respective periods of time during which unpaid liabilities of said insurance company were incurred.

According to such decree, defendant's proportion of said assessment, in order to pay its just proportion of the unpaid losses and expenses incurred by said Insurance Company during the time defendant held its policy amounts to $537.48.

It is stipulated by counsel for the respective parties in this case, with the same force and effect and validity as if the same had been established on the trial of the case by competent evidence, that the said Union Mutual Fire Insurance Company of Cincinnati, Ohio, is a corporation organized under the laws of the State of Ohio,
40½ and that said insurance company has never complied with any of the requirements of the several statutes of the State of Michigan obligated upon insurance companies of other States seeking to transact business in the State of Michigan.

The files, records and exhibits in this case are hereby made a part of these findings.

Conclusions of Law.

There is no evidence in this case to establish the claim that this action is barred by the Statute of Limitations.

The decree of assessment made by the Supreme Court of Ohio would be binding upon the defendant and conclusive in this case, notwithstanding the fact that the defendant was not served with summons in this action, provided recovery be not barred for other reasons.

Whether or not the witness Marsh was legally the agent of defendant in securing the insurance in question would be a matter for serious consideration if the case turned upon that point. He was an employee of the local insurance agency which had secured a line of insurance from the defendant. The defendant thereafter, on its part, merely applied to this agency in its home town for an increase of insurance, which the agency accepted and proceeded to place as best it could, turning that which it could not care for itself over to other agencies.

The selection of this particular insurance company in which to

place a portion of the risk, was evidently made in the usual course of business, either by the local agent at Manistique, or George R. Lewis & Co. of Minneapolis, Minnesota, and the details of the application, obtaining the policy, agreeing on the policy, etc. were worked out in the usual course of business by the insurance agency, although accepted and ratified by the defendant. But, so far as the defendant was concerned, its application for insurance was made and
41 this business was done with the home office at Manistique, with which it was in the habit of doing business. The conditions are not to be considered exactly the same as if this defendant had specially selected an outside insurance company in another state, as the one with which it particularly desired to do business, and having done so, had directly applied by correspondence to such company for insurance, but for the disposition of this case, we may assume that Marsh acted as agent of defendant in securing the insurance, and so come directly to the leading contention presented, involving the validity of this contract under the laws of Michigan. It is admitted that the Union Mutual Fire Insurance Company of Cincinnati, Ohio, never had complied with any of the requirements of the several statutes of this state obligated upon insurance companies of other states who seek to transact business in Michigan. Section 5157 of the Compiled Laws of 1897 provides, "It shall not be lawful for any person or persons, as agent, solicitor, surveyor, broker, or in any other capacity, to transact or to aid in any manner, directly or indirectly, in transacting or soliciting within this state any insurance business for any person, persons, firm or co-partnership, who are non-residents of this state, or for any firm or inland navigation insurance company or association, not incorporated by the laws of this state, or to act for or in behalf of any person or persons, firm or corporation, as agent, broker, or in any other capacity, to procure, or assist to procure a fire or inland marine policy or policies of insurance on property situated in this state, for any non-resident person, persons, firm or co-partnership, or in any company or association without this state, whether incorporated or not, without procuring or receiving from the Commissioner of Insurance the certificate of authority provided for in section 23 of and act, etc., and section 10467 of the Compiled Laws of 1897 provides
42 that when by the laws of this state, any act is forbidden to be done by any corporation or by any association of individuals without express authority by law, and such acts shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of such act." These provisions of our Statute, and others of like nature, have been before our Supreme Court from time to time and interpreted with no uncertain sound.

A full and able discussion of the subject is found in the case of Seamans *vs.* Temple Co. 105 Mich. p. 401, and other cases there cited. Numerous decisions along the same line are found in other states, in one of which, decided in Pennsylvania, plaintiff himself was a party.—Swing *vs.* Munson, 191 Pa. 582.

Plaintiff admits the force of these decisions, but seeks to distinguish the case at bar, on the ground that the foreign insurance company he represents did not have any agent, broker, inspector or other representative in the State of Michigan, nor solicit, directly or indirectly, this insurance or any other insurance within the state, and did not, in fact, transact any business within the State of Michigan in violation of its Statutes.

While we recognize some difference in the facts shown in these respective cases from those established in the case at bar, we are unable to recognize any distinction in the principles of law involved, in view of the well settled policy of our legislature and decisions dealing with foreign insurance companies. We are not confronted with the question of whether or not this is a valid contract under the laws for the State of Ohio. It may be valid in Ohio and void in Michigan, under our Statutes. Regulating the business of insurance, even to the exclusion of foreign insurance com-
43 panies from taking any risks in the state under any conditions had been held constitutional. While this may be held to be an Ohio contract, nevertheless we cannot escape from the fact that it was a contract to insure within the State of Michigan, property of a citizen of the state, and was taking an insurance risk in this state.

In the case of the People against Howard, 50 Mich. p. 248, it is said "The clearly expressed intention of that act was to entirely prevent insurance companies from taking any risks in this state. This was and has been for some time, the settled policy of this state, as appears by legislature, and for the protection of the citizens of the state and companies submitting to our laws and paying the state taxes. The Statute is prohibitory in its character; the policy is wise and as such should be enforced."

The conclusion of the Court is that the contract of insurance under consideration is unlawful and invalid, and there can be no recovery for any assessment upon the policies issued to defendant pursuant to such contract.

Judgment will be entered accordingly.

J. H. STEERE,
Circuit Judge."

Errors are assigned upon the refusal of the Court to find the facts according to certain requests of the plaintiff, and also upon the conclusions of law. The facts as found by the Court are supported by the evidence as disclosed in the record. It is for this Court to determine whether the Court erred in his conclusions of law from the facts found.

We do not think he did. His conclusions of law are supported by the facts as found by him, and his decision conforms with the frequent utterances of this Court as to the settled policy of this State in cases where the statutes in question have been interpreted.
44 In the case of Seamans *vs.* Temple Co. 105 Mich. 401, this Court, approving previous decisions, held upon the very question raised and involved in this case as follows, "Counsel for plaintiff contends that the insurance company has not done business in this

State, but that the contract is one made in Wisconsin, to be performed there, and that it is therefore valid, and that being so, the plaintiff may sue and recover upon it in the Courts of this State under the rule of comity between States. This rule applies to corporations as well as natural persons. How. Stat. paragraph 8136; but the right of a foreign corporation to sue in our Courts is limited, first, by statute (section 8136) and second, by the general rule that the doctrine of state comity will not be applied in behalf of a foreign corporation seeking to recover upon a claim or contract expressly prohibited by law, or one which is clearly at variance with the settled policy of the state. Thompson *vs.* Waters 25 Mich. 214; Christian Union *vs.* Yount 101 U. S. 356. It is the policy of this state to limit the business of insurance, to such corporations, domestic and foreign, as shall be authorized by the Commissioner of Insurance to do business, after compliance with certain regulations and conditions prescribed by law, * * * If it be conceded that the contract was made in Wisconsin, and that the premiums and loss if any, are payable there, it is as much in contravention of the policy of this state as though it had been made and was to be performed here. It cannot be supposed that the statutes cited were intended merely to prevent the act of making the contract in this State. The object is to protect the citizens of this State against irresponsible companies, and to prevent insurance by unauthorized companies upon property in this State. American Insurance Co. *vs.* Story 41 Mich. 401; Hartford Fire Insurance Co. *vs.* Raymond 70 Mich. 501.

45 "The argument *of* counsel for plaintiff is substantially this * * * 'We know that the laws of Michigan are designed to prevent our insuring Michigan property but we have done so in a way that does not contravene the letter of Michigan statutes, because we have done nothing upon Michigan soil. We have evaded your law, and obtained a contract which you have sought to prohibit, and now we ask you to enforce it for us under the doctrine of State comity.'

"Under such circumstances the Courts of the State are not open to the offending company, and the rule of State comity cannot be invoked in its behalf."

The contention in this case is the same as in the case above cited. It is true in that case the Court found that within the State the insurance company had solicited the insurance; but in answer to the arguments there advanced the Court very properly decided the case upon the broader ground. The reasoning in that case is adopted in the case at bar and controls it. To hold otherwise would operate to nullify the clear intent of the legislature, to disregard forever decisions of this Court, and disturb the settled policy of the State. The judgment of the Circuit Court is affirmed.

AARON V. McALVAY.
CLAUDIUS B. GRANT.
FRANK A. HOOKER.
R. M. MONTGOMERY.
WILLIAM L. CARPENTER.

(Endorsed:) Filed June 6, 1905. Chas. C. Hopkins, Clerk.

46 *Judgment.*

At a Session of the Supreme Court of the State of Michigan held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the sixth day of June in the year of our Lord one thousand nine hundred and five.

Present, the Honorable Joseph B. Moore, Chief Justice. William L. Carpenter, Aaron V. McAlvay, Claudius B. Grant, Charles A. Blair, Robert M. Montgomery, Russell C. Ostrander, Frank A. Hooker, Associate Justices.

No. 20780.

James B. Swing, Trustee, etc., Plaintiff and Appellant,
vs.
The Weston Lumber Company, Defendant.

The record and proceedings in this cause having been removed to this Court by Writ of Error, issued to the Circuit Court for the County of Schoolcraft, and the same, and the matters in Error assigned, having been seen and inspected and duly considered by the Court, and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court there is no error, Therefore, it is ordered and adjudged that the judgment of said Circuit Court for the County of Schoolcraft be and the same is hereby in all things affirmed, and that the defendant do recover of the plaintiff, its costs, to be taxed, and that it have execution therefor.

47 The Supreme Court of the State of Michigan.

James B. Swing, as Trustee for the Creditors of The Union Mutual Fire Insurance Company of Cincinnati, Ohio (Formerly a Corporation), Appellant,
vs.
The Weston Lumber Company, a Corporation of the State of Michigan, Respondent.

Petition for Writ of Error.

To the Honorable Joseph B. Moore, Chief Justice of the Supreme Court of the State of Michigan:

Now comes James B. Swing, as Trustee for the creditors of The Union Mutual Fire Insurance Company of Cincinnati, Ohio, (formerly a corporation), the above named relator and appellant, by his attorneys, Virgil I. Hixson and Patterson A. Reece, and alleges that he is a citizen of the United States of America, and complains that in the above entitled matter on the 6th day of June, A. D. 1905, final judgment was rendered against your Petitioner by the Supreme Court of the State of Michigan, that being the highest court of law

or equity in the said State, and that in said judgment it was adjudged that the provisions of the laws of and for the State of Michigan made it unlawful for any insurance company not incorporated within said State to issue and deliver outside of the State of Michigan a policy of insurance in such unlicensed insurance company to a person whose residence is within the State of Michigan and insuring property located within said State, without first having obtained a license from the insurance authorities of the State of Michigan to conduct and carry on the business of such insurance company within said State; and that where an insurance company not incorporated nor licensed by the State of Michigan has issued and delivered outside of said State an insurance policy insuring persons whose residence was within said State and the property which was so
48 insured was located within said State, that the courts of the State of Michigan are not open to such insurance company nor to the Trustee for the creditors of such insurance company appointed by the Supreme Court of another state, after the dissolution of such insurance company; and said judgment decides that said provisions of the statutes of the State of Michigan are not in conflict with the provisions of Section 1 of the 14th Amendment to the U. S. Constitution in that the provisions of said laws of Michigan did not deprive certain citizens of the United States and of the State of Ohio of rights, privileges or immunities secured to the other citizens of the United States and of said State of Michigan, nor of liberty or of property without due process of law or the equal protection of the law; whereby manifest error has happened to the great damage of this Petitioner.

Wherefore your Petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Michigan and the judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States and the error complained of by your Petitioner may be examined and corrected and said judgment reversed; that citation be granted and signed; that the bond herewith prepared be approved, and that upon compliance with the terms of the statutes in such cases made and provided, said bond and writ of error may operate — a supersedeas; that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment aforesaid of said Supreme Court of the State of Michigan be reversed.

JAMES B. SWING,
As Trustee for the Creditors of The Union Mutual Fire Insurance Company of Cincinnati, Ohio (Formerly a Corporation), Petitioner,
By VIRGIL I. HIXSON AND
PATTERSON A. REECE,
His Attorneys.

49 (Copy.)

Bond.

Know all men by these presents, That we, James B. Swing, as trustee for the creditors of The Union Mutual Fire Insurance Company, of Cincinnati, Ohio, as principal, and The American Bonding Company, of Baltimore, as sureties, are held and firmly bound unto The Weston Lumber Company in the full and just sum of Three Hundred & 00/100 dollars, to be paid to the said The Weston Lumber Company, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this sixteenth day of September, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a session of the Supreme Court of the State of Michigan, in a suit depending in said Court, between James B. Swing, Trustee as aforesaid, Plaintiff, and The Weston Lumber Company, a corporation etc., Defendant, a judgment was rendered against the said James B. Swing, Trustee aforesaid, and the said James B. Swing, Trustee aforesaid, having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Weston Lumber Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said James B. Swing as trustee for the creditors of The Union Mutual Fire Insurance Company of Cincinnati, Ohio, shall prosecute said Writ of Error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JAMES B. SWING, [SEAL.]
As Trustee of The Union Mutual Fire Ins. Co. of Cincinnati.
AMERICAN BONDING COMPANY
OF BALTIMORE, [SEAL.]
By JOHN DOYLE, *Attorney in Fact.*

Sealed and delivered in presence of—
B. SCHAEFER.
P. A. REECE.
H. F. HEIMSAIT.

Approved by—
JOSEPH B. MOORE,
Chief Justice of the Supreme Court of the State of Michigan.

(Endorsed:) Filed Oct. 7, 1905. Chas. C. Hopkins, Clerk.

50 The Supreme Court of the State of Michigan.

JAMES B. SWING, as Trustee for the Creditors of the Union Mutual Fire Insurance Company of Cincinnati, Ohio (Formerly a Corporation), Appellant,

vs.

THE WESTON LUMBER COMPANY, a Corporation of the State of Michigan, Respondent.

Assignment of Errors.

James B. Swing, as the Trustee for the Creditors of The Union Mutual Fire Insurance Company of Cincinnati, Ohio, (formerly a corporation) Appellant, in connection with the Petition for writ of error herein makes the following assignment of errors which the appellant avers occurred in the final order and judgment herein, dated the 6th day of June, A. D. 1905, as follows, to-wit:

That the Supreme Court of the State of Michigan erred in adjudging and deciding that where an insurance company not incorporated nor licensed by the State of Michigan has issued and delivered outside of said state an insurance policy insuring persons whose residence was within said state and the property which was so insured was located within said state, that the courts of the state of Michigan are not open to such insurance company nor to the Trustee for the creditors of such insurance company appointed by the Supreme Court of another state, after the dissolution of such insurance company.

Appellant further says that the judgment of said Supreme Court of the State of Michigan aforesaid in its interpretation of the laws of the State of Michigan is repugnant to and in conflict with Section 1 of the 14th Amendment to the Constitution of the United States, which declares that:

"No state shall make or enforce laws which shall abridge the "privileges or immunities of citizens of the United States nor shall "any state deprive any person of life, liberty or property without due "process of law."

51 And appellant further says that in the aforesaid suit there was drawn in question the right of appellant to maintain an action in the courts of the State of Michigan and that appellant was denied and refused the right to maintain an action in the courts of said state contrary to the provisions of Section 1 of the 14th Amendment of the Constitution of the United States; to which judgment and decision the appellant hereby excepts and assigns the same as error.

Wherefore said appellant prays that the judgement and decision aforesaid may be reversed, annulled, and altogether held for naught, and that appellant may be restored to all things which he has lost by the action and because of the said judgment and decision.

PATTERSON A. REECE AND
VIRGIL I. HIXSON,
Attorneys for Appellant.

52 [Endorsed:] 20780. The Supreme Court of the State of Michigan. James B. Swing, as Trustee for the Creditors of The Union Mutual Fire Insurance Company of Cincinnati, Ohio,

(formerly a corporation) Appellant, *vs.* The Weston Lumber Company, a corporation of the State of Michigan, Respondent. Assignment of Errors. Filed Oct. 7, 1905. Chas. C. Hopkins, Clerk. Patterson A. Reece, Virgil I. Hixson, Attorneys for Appellant.

53 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Michigan before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James B. Swing, as Trustee for the creditors of The Union Mutual Fire Insurance Company, of Cincinnati, Ohio, Plaintiff and appellant and The Weston Lumber Company, Defendant and appellee wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of
54 a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said James B. Swing, Trustee as aforesaid as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixth day of October, in the year of our Lord one thousand nine hundred and five.

[Seal of the U. S. Circuit Court, Weston District of Mich., Southern Division.]

CHARLES L. FITCH,
Clerk of the Circuit Court of the United States for the Western District of Michigan.

Allowed by
JOSEPH B. MOORE,
Chief Justice of the Supreme Court of the State of Michigan.

54½ To the Supreme Court of the United States:

The execution of the within Writ appears by the transcript of record hereto annexed.

Lansing, Mich., Nov. 4, 1905.

[Seal of the Supreme Court of Michigan, Lansing,]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

55 UNITED STATES OF AMERICA, *ss:*

To The Weston Lumber Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Michigan wherein James B. Swing, as Trustee for the creditors of The Union Mutual Fire Insurance Company, of Cincinnati, Ohio, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph B. Moore, Chief Justice of the Supreme Court of the State of Michigan, this sixth day of October, in the year of our Lord one thousand nine hundred and five.

JOSEPH B. MOORE,
Chief Justice of the Supreme Court of the State of Michigan.

55½ STATE OF MICHIGAN, *County of Schoolcraft, ss:*

On this 20th day of October, in the year of our Lord one thousand nine hundred and five, personally appeared Virgil I. Hixson, before me, the subscriber, a Notary Public in and for said county of Schoolcraft, and makes oath that he delivered a true copy of the within citation to Carey W. Dunton, Attorney for The Weston Lumber Company, Defendant in Error, personally at the city of Manistique in said county on the 20th day of October A. D. 1905.

VIRGIL I. HIXSON.

Sworn to and subscribed the 20th day of October, A. D. 1905.

[Seal of Wm. S. Crowe, Notary Public, Schoolcraft County, Mich.]

WM. S. CROWE,
Notary Public.

My commission expires Dec. 1st, 1907.

[Endorsed:] 20780 Filed Nov. 3, 1905 Chas. C. Hopkins Clerk.

56 Supreme Court of the State of Michigan.

JAMES B. SWING, Trustee, etc., Plaintiff and Plaintiff in Error,
vs.
THE WESTON LUMBER COMPANY, Defendant and Defendant in Error.

STATE OF MICHIGAN, *In Supreme Court, ss:*

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the Judges of said Court, and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof; that attached thereto are the Writ of Error, with allowance endorsed thereon, the Citation, with proof of service of copy thereof on adverse party, and a copy of the Bond, duly approved, together with the Assignments of Error in the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Supreme Court, at the City of Lansing this fourth day of November in the year of our Lord nineteen hundred and five.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No. 19,957. Michigan supreme court. Term No. 145. James B. Swing, as trustee for the creditors of The Union Mutual Fire Insurance Company of Cincinnati, Ohio (formerly a corporation), plaintiff in error, *vs.* The Weston Lumber Company. Filed November 6th, 1905. File No. 19,957.

FILE COPY.

FILED
DEC 31 19
JAMES H. McKE

Supreme Court of the United States

October Term, 1906

No. 145

James B. Swing, as Trustee for the Creditors of The Union Mutual Fire Insurance Company of Cincinnati, Ohio (formerly a corporation),

Plaintiff in Error,

vs.

The Weston Lumber Company (a corporation),

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MICHIGAN.

Brief for Plaintiff in Error.

PATTERSON A. REECE,
VIRGIL I. HIXSON,
Counsel for Plaintiff in Error.

(19,957)

(19,957)

Supreme Court of the United States

October Term, 1906

No. 145

James B. Swing, as Trustee for the Creditors of The Union Mutual Fire Insurance Company of Cincinnati, Ohio (formerly a corporation),

Plaintiff in Error,

vs.

The Weston Lumber Company (a corporation),

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MICHIGAN.

Brief for Plaintiff in Error.

STATEMENT.

James B. Swing, as the Trustee for the creditors of The Union Mutual Fire Insurance Co. of Cincinnati, Ohio, plaintiff, (appointed by the Supreme Court of Ohio, and under its orders) began an action in Michigan against The Western Lumber Co., defendant, for said defendant's due proportion of the unpaid liabilities of said insurance company, incurred during the time said defendant held its policy of insurance therein.

Said insurance company was organized under the laws of Ohio, but was not licensed to do business in Michigan.

The defendant was and is a resident of the State of Michigan and the property insured was located there.

No act in regard to said policy was done in Michigan by any one representing said insurance company.

THE FEDERAL QUESTION.

The Supreme Court of Michigan decided that the plaintiff could not maintain this action in Michigan, because, in said court's opinion, the issuing of a policy by such unlicensed insurance company, insuring persons and property located in Michigan, constituted, in itself, a violation of the Michigan statutes; notwithstanding that the policy was not solicited by any person for said insurance company, nor was it issued nor delivered within the State of Michigan, nor was anything done in regard to that policy within that state, by any one in any way representing said insurance company.

THE ERROR RELIED UPON BY PLAINTIFF.

That the Supreme Court of Michigan erred in adjudging that the courts of Michigan were not open to said insurance company nor to the plaintiff as the Trustee for the creditors, because the insurance company, unlicensed by the State of Michigan, had issued the insurance policy, insuring the defendant, whose residence was within said state and on property located there; notwithstanding that there was nothing done, by any one representing said insurance company, within the State of Michigan.

That such erroneous judgment of the Supreme Court of Michigan in its interpretation of the laws of that state, is

repugnant to and in conflict with Sec. 1, 14th Amendment to the Constitution of the United States, which declares that:

> "No state shall make or enforce laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And that this plaintiff in error was denied and refused the right to maintain this action in the courts of said state, contrary to said provisions of Sec. 1, 14th Amendment of the Constitution of the United States. (Rec., p. 47.)

THE MICHIGAN STATUTE

which the Supreme Court of Michigan construed to mean that this plaintiff could not maintain this action in Michigan, notwithstanding that said court admits in its decision that no person, in any way representing that insurance company, did any act within the State of Michigan regarding this matter, is in the following words:

> "It shall not be lawful for any person or persons, as agent, solicitor, surveyor, broker, or in any other capacity, to transact or to aid in any manner, directly or indirectly, in transacting or soliciting within this state any insurance business for any person, persons, firm or co-partnership, who are non-residents of this state, or for any firm or inland navigation insurance company or association, not incorporated by the laws of this state, or to act for or in behalf of any person or persons, firm or corporation, as agent, broker, or in any other capacity, to procure, or assist to procure a fire or inland marine policy or policies of insurance on property

situated in this state, for any non-resident person, persons, firm or co-partnership, or in any company or association without this state, whether incorporated or not, without procuring or receiving from the Commissioner of Insurance the certificate of authority provided for in section 23 of an act., etc., and section 10467 of the Compiled Laws of 1897 provides that when by the laws of this state, any act is forbidden to be done by any corporation or by any association of individuals without express authority by law, and such acts shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of such act." (Rec., p. 41.)

ARGUMENT.

POINT I.

The insurance broker employed by the defendant was the defendant's agent, and his acts in obtaining the policy were the defendant's acts. And no act done by the defendant or his agent can be imputed to the insurance company so as to be construed to be a violation by it of the Michigan statutes.

(*a*) In the policy held by the defendant in said insurance company was the condition:

> "In any matter relating to this insurance no person unless duly authorized in writing shall be deemed the agent of this company." (Rec., p. 28.)
>
> "What the Company meant by the clause in question, so far as it relates to the agency, for the one party or the other, of the person procuring the insurance, was,

to exclude the possibility of such person being regarded as its agent, under any circumstances whatever, or in any transaction relating to this insurance. This, we think, is not only the proper interpretation of the contract, but the only one at all consistent with the intention of the parties as gathered from the words used."

GRACE vs. AMERICAN CENTRAL, 109 U. S., 278-285.

To the same effect are:

WOOD vs. FIREMEN'S F. INS. CO., 126 MASS., 316;

SHAWMUT M. F. INS. CO. vs. STEVENS, 9 ALLEN 334 (MASS.);

WEIDERT vs. STATE INS. CO., 19 ORE. 261;

FIRE ASSOCIATION vs. HOGWOOD, 82 VA. 342.

(*b*) The evidence in this case is clear that Mr. Marsh did in fact, act as the agent of the defendant in obtaining this insurance. That he had all of the defendant's insurance and defendant gave him full and general authority to get insurance for them, in any companies he thought best, so as to keep their property covered. (Rec., pp. 8-10.)

"Glenn & Son wrote to Bridges, an insurance agent, asking additional insurance upon their merchandise, designating no company nor rate, but authorizing him to obtain a policy for them. These facts constituted Bridges the agent of the insured for the purpose of obtaining the policy."

EAST TEXAS vs. BLUM, 76 TEX. 653.

"Where the assured were applied to by insurance brokers to affect additional insurance upon their works and upon such being given, the brokers approached the secretary of the defendant company, who instructed the

brokers to send a form or description of the property, and that the policy would be forwarded, and where the application was filled in by the broker, without the company's instruction or knowledge: HELD, that such broker was the agent of the assured, and not of the company."

McFARLAND vs. PEABODY INS. CO., 6 W. VA. 425.

"In all cases the familiar rule respecting the relation of principal and agent applies, that, within the scope of his authority to procure insurance, he stands in the place of the principal, and the latter is bound by whatever, within such scope, such agent may do, to the same extent as if it were done by such principal."

JOHN R. DAVIS LUMBER CO. vs. HARTFORD F. INS. CO., 95 WISC. 234.

To the same effect are:

AM. FIRE INS. CO. vs. BROOKS, 83 MD. 22;
BUICK vs. INS. CO., 103 MICH. 75;
INS. CO. vs. REYNOLDS, 36 MICH. 502;
JOHNSON vs. NORTH BRITISH, 66 O. S. 6;
DULUTH vs. KNOXVILLE F. INS. CO., 85 TENN. 76.

(*c*) In this case the Michigan courts found and decided that the broker was the agent of the defendant in securing the insurance.

In the Court's conclusions it uses these words:

"For the disposition of this case we may assume that Marsh acted as the agent of defendant in securing the insurance and so come directly to the leading contention presented, involving the validity of this contract under the laws of Michigan." (Rec., p. 41.)

"While this may be held to be an Ohio contract,

nevertheless we cannot escape from the fact that it was a contract to insure within the state of Michigan property of a citizen of the state, and was taking an insurance risk in this state." (Rec., p. 42.)

So it appears that in this case:

(*a*) It was provided in the policy that no person should be considered the agent of the company unless authorized in writing, and that such provision is legal and binding;

(*b*) That according to the defendant's own witness, Mr. Marsh was in fact the agent of the insured, and not of the insurance company;

(*c*) That the court throughout considered that Mr. Marsh was the agent of the defendant.

Then it can safely be accepted as a fixed fact in this case that the broker, Mr. Marsh, acted solely in the interests and as the agent of the defendant. No person within the State of Michigan, other than Mr. Marsh, appears in any way to have been connected with the procuring of that policy.

POINT II.

The mere insurance of a resident of Michigan, upon property located there, is not "doing business" within that state, in fact nor in law where no act was done there by any person representing the insurance company.

As has been clearly shown under Point I, the evidence in this case shows, and the decision of the Michigan Courts is, that the insurance company did not have any person within the state of Michigan, to attend to any thing relating to this matter.

But that, on the contrary, the defendant sent outside of the state of Michigan by its agent, Mr. Marsh, and con-

summated by mail from outside of Michigan, a contract of insurance, insuring the defendant against loss by fire, etc., on their property located in Michigan.

And the decision of the Supreme Court of Michigan in this case, as cited and quoted under Point I, is based upon the theory that the mere insurance of residents of Michigan upon property located there is of itself "doing business" within that state; notwithstanding that no act was done there by any person representing the insurance company.

That this theory is erroneous, we believe can be made plain both by reason and precedent.

> "Has not a citizen of a state, under the provisions of the Federal Constitution above mentioned, a right to contract, outside of the state for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the state by an insurance company or its agents doing business therein, which are in violation of the state statutes. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case where the contract was made outside the state and as such was a valid and proper contract. . . . The only admitted facts concerning the contract was that said company had written insurance upon property in this state for the benefit of a citizen thereof. This did not furnish ground for the abating of the action."
>
> ALLGEYER vs. STATE OF LOUISIANA, 165 U. S. 578; 17 SUP. CT. 427; 41 L. Ed. 632.

And See Holder vs. Aultman, 169 U.S. 81; (Fr. Mich. Ct.

To the same effect are:

SWING, Trustee vs. HILL, 165 IND. —; 75 N. E. 658; (Oct. '05.)

SWING, Trustee vs. EVANSVILLE, — IND. —; 76 N. E. 1117; (Mar. '06.)

SWING, Trustee vs. BRISTER, — MISS. —; 40 S. 146; (Mar. '06.)

TABOR vs. GOSS, 11 COLO. 419;

NEW ORLEANS vs. RHENISH, 31 LA. AN. 781;

"The issuing of a policy in New York on property here cannot be considered as the carrying on of business in this state (ARKANSAS) within the intent and meaning of the statutes in question."

MARINE vs. ST. LOUIS, 41 FED. REP. 654;
And see HYDE vs. GOODNOW, 3 N. Y. 271:

"A foreign insurance company does not DO BUSINESS in this state where no person in the state is authorized to ACCEPT applications for insurance, receive or collect moneys thereon, or to receive or collect on any other account for the said company, but where all applications are sent direct to the foreign office, from which all policies are issued."

FULTON vs. COMMERCIAL T. M. A., 172 PA 117; 33 ATL. 324;

(In the case at bar the insurance company did not even receive the application nor do anything inside of Michigan, and the Michigan courts found that it was an Ohio contract. Rec., p. 42.)

"A foreign building and loan association having its office in the state of its domicile, where all contracts are passed upon, does not, in making a loan to a citizen of Pennsylvania on a bond, through an agent in Pennsylvania, and taking as security for the debt a mortgage on Pennsylvania real estate, make a Pennsylvania contract governed by the usury laws of this state; nor is the association DOING BUSINESS IN PENNSYLVANIA within the meaning of the act of April

22, 1874, requiring registration of foreign corporations."

PEOPLES B. & L. A. vs. BERLIN, 201 PA. 1; 50 ATL. 308; 88 A. S. R. 764;

"Taking an application for life insurance by an agent in WASHINGTON territory, and forwarding to the insurance company in KANSAS, which alone had authority to accept, or reject the application, and where it was accepted, and a policy issued thereon, *is not "doing insurance business"* in said territory, within the meaning of the statute thereof."

HACHENY vs. LEARY, 12 OREGON 40.

"The negotiations were all carried on by mail, through agents in TENNESSEE, the loan being approved at the company's home office in NEW YORK, and all notes being payable at that office. Held, that the contract was made in New York, and to be performed there, and that the company *was not doing business in TENNESSEE* within the meaning of the statutes. A federal court will not refuse to enforce a valid contract, harmless in itself, which is non-enforceable in the state courts merely on account of noncompliance with state administrative regulations."

EASTERN vs. BEDFORD, 88 FED. REP. 7.

"In such an action it appeared that the insured resided, and the property was located, in the state of Maine; that the insurance company was a Tennessee corporation having no office nor agent in Maine; and that the insurance was effected by correspondence through the mails. Held, in consideration of a further provision of such statute requiring insurance companies "doing business" in the state to procure a license for that purpose, that *these facts did not constitute a carrying on of business in the state of Maine."*

HAZELTINE vs. MISS. VAL. FIRE INS. CO., 55 FED. REP. 743 (TENN. CIR.).

POINT III.

The statutes of Michigan could not, under the provisions of our Federal Constitution, prohibit a resident of that state from procuring in another state, from an insurance company not authorized to do business in Michigan, insurance on property belonging to defendant, although located in Michigan.

And the Supreme Court of Michigan, by refusing to allow plaintiff to maintain this action, notwithstanding that the business was transacted entirely outside of the state of Michigan, has construed the statutes of that state so as to be violative of Sec. 1, 14th Amendment of the Constitution of the United States, in that it has abridged the privileges and immunities of plaintiff as a citizen of the United States, and has deprived him of property without due process of law, and has denied to him the equal protection of the laws.

The following decisions of this court seem to fit this case:

> "The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits, while he himself remains within it. The contract in this case was thus made. It was a valid contract, made outside of the State, to be performed outside of the State, although the subject was property within the State. As the contract was valid in the place where made and where it was to be performed, the party to the contract upon whom is devolved the right or duty to send the notification in order that the insurance provided for by the contract may attach to the property specified in the shipment mentioned in the notice, must have the liberty to do that act and to give that notification within the limits of the State, any prohibition of the state statute to the

contrary notwithstanding. The act done within the limits of the state under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal."

ALLGEYER vs. LOUISIANA, 165 U. S. 591.

See Holder vs. Aultman, 169, U.S, 81; [illegible] Mich. Ct

"The provisions of the fourteenth amendment to the Constitution of the United States, which forbids a state to deny to any person within its jurisdiction the equal protection of the law, applies to corporations."

PEOPLE vs. CENTRAL, 118 U. S. 394;

And previous constructions of the same statute by the Supreme Court of Michigan are exactly in line with the above, viz.:

"The statute (Comp. L. 1871, Sec. 1683) regulating the transaction of the business of insurance in this state by the agents of foreign companies, does not assume to forbid the making of contracts of insurance abroad upon property here, nor does it assume to invalidate such contracts, but applies only to operations *within the state.*"

CLAY vs. HURON, 31 MICH. 346.

"Where an application for life insurance in a foreign insurance company is made in MICHIGAN, but, under its by-laws indorsed on the policy, is non-operative until approved by the home medical director, and from which it is also apparent that no binding contract was to be consummated until such approval and the payment of the membership fees at the home office; and it is further provided in the blank form for membership, signed by the insured, that the contract of insurance shall be

considered as entered into at the place where such office is located, and shall be governed by, and construed in accordance with the laws of the state in which the corporation resides, the contract will be treated as one made in the last named state."

VOORHEIS vs. PEOPLES, 91 MICH. 469.

And the latest decisions of the Supreme Courts of all the states (excepting Michigan and Wisconsin) are in harmony with the above decisions on this question, viz.:

"In a suit by a trustee for creditors of a foreign mutual fire insurance company to recover a statutory liability against policyholders, it was no defense that the company had written defendant's policy, insuring property in Indiana, for the benefit of defendants, who were citizens of that state, without having complied with its insurance laws; the legislature having no authority to prohibit citizens from making contracts outside the state insuring property within its jurisdiction."

SWING vs. HILL, 165 IND. —; 75 N. E. 658; (Oct. 1905).

Followed in SWING vs. EVANSVILLE, —— IND. —; 76 N. E. 1117; (Mar. 1906).

And see SWING vs. BRISTER, —— MISS. —; 40 S. 146; (Mar. 1906).

"Foreign insurance companies issuing policies from their own domiciles, who do not carry on business here, who have no agent here, and who only agree to accept risks placed for them by a person residing here, cannot be compelled to pay a license tax."

NEW ORLEANS vs. RHENISH, 31 LA. AN. 781.

"There is and could be nothing in this statute by which a citizen of Missouri or one owning property therein is or could be deprived of the right to insure

such property in the state of Illinois in a company authorized under its laws to insure that property there if he saw proper to do so; and having no extra-territorial force, there is and could be nothing to deprive such company of the right to insure that property if it saw proper to do so."

LUMBERMENS MUT. INS. CO. vs. RAILWAY, 149 MO. 165; 50 S. W. 281;

"A contract of insurance made out of this state on property here situated is valid, and will be enforced here."

COLUMBIA vs. KINYON, 37 N. J. L. 33;

"A State statute imposing on insurance companies of another State or nation the same obligations and prohibitions that are imposed in such other State or nation upon corporations of the former State, is retaliatory in character, and must be confined to cases fairly within its letter."

STATE vs. FIDELITY, 49 O. S., 441.

"Taking an application for life insurance by an agent in WASHINGTON Territory, and forwarding to the insurance company in KANSAS, which alone had authority to accept or reject the application, and where it was accepted, and a policy issued thereon, is not 'doing insurance business' in said territory, within the meaning of the statute thereof."

HACHENY vs. LEARY, 12 OREGON, 40.

"A statute which should attempt to prevent a non-resident owner of property in this State, or a resident owner not at the time within the State, from insuring his property in any manner lawful in the place of the contract, would be void as extra-territorial. If a citizen of PENNSYLVANIA has incurred a liability by a contract validly made outside its boundaries, no law of this State can, under the constitution of the United

States, prevent his fulfillment of that obligation, even by an act done within the State."

COMMONWEALTH vs. BIDDLE, 139 PA. ST., 605.

"A foreign building and loan association, having its office in the State of its domicile, where all contracts are passed upon, does not, in making a loan to a citizen of Pennsylvania on a bond, through an agent in Pe nsylvania, and taking as security for the debt a mortgage on Pennsylvania real estate, make a Pennsylvania contract governed by the usury laws of this State; nor is the association DOING BUSINESS IN PENNSYLVANIA, within the meaning of the act of April 22, 1874, requiring registration of foreign corporations."

PEOPLE'S B. & L. A. vs. BERLIN, 201 PA., 1; 50 ATL., 308; 88 A. S. R., 764.

And see FULTON vs. COMMERCIAL T. M. A., 172 PA., 117; 33 ATL., 324.

SUMMARY.

So in this case it clearly appears:

1. That the insurance broker employed by the defendant was the defendant's agent, and his acts in obtaining the policy were the defendant's acts, and the Michigan Courts so considered them.

That no act done by the defendant or his agent can be imputed to the insurance company so as to be construed to be a violation by it of the Michigan statutes.

2. That the mere insurance of a resident of Michigan, upon property located there, is not "doing business" within that State, in fact nor in law, where no act was done there by any person representing the insurance company.

3. That the Supreme Court of Michigan, by refusing to allow plaintiff to maintain this action, notwithstanding that the business was transacted entirely outside the State of Michigan, has erred, and has, construed the statutes of that State so as to be violative of Section 1, 14th Amendment of the Constitution of the United States, in that it has abridged the privileges and immunities of plaintiff as a citizen of the United States, and has deprived him of property without due process of law, and has denied to him the equal protection of the laws.

For the foregoing reasons the decision of the Supfeme Court of Michigan in this case should be reversed.

Respectfully submitted,

PATTERSON A. REECE,

VIRGIL I. HIXSON,

Counsel for Plaintiff in Error.

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JAN 10 1907
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 145.

JAMES B. SWING, AS TRUSTEE FOR THE CREDITORS OF THE UNION MUTUAL FIRE INSURANCE COMPANY OF CINCINNATI, OHIO (FORMERLY A CORPORATION), PLAINTIFF IN ERROR,

vs.

THE WESTON LUMBER COMPANY (A CORPORATION), DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF MICHIGAN.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

PATTERSON A. REECE,
VIRGIL I. HIXSON,
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IN ERROR TO THE SUPREME COURT OF MICHIGAN.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The Brief for Defendant in Error is confined to endeavoring to maintain that the Record shows that the insurance company (of which Plaintiff in Error is the Trustee for its creditors) "transacted the business within the State of Michigan."

We desire briefly to present for the court's attention what the Record shows on the above point, in addition to what

we have set out in our first brief, and in addition to what appears in the Brief for Defendant in Error.

The testimony of Mr. Marsh (Rec., pp. 8-10) is that he was an employee of the bank. That the Weston Lumber Co. applied to the bank for all the insurance it needed; that Mr. Hill, the president of the bank, was also the superintendent of the Weston Lumber Co., and Mr. Weston, the principal stockholder in the Lumber Co., was also a large stockholder in the bank (Rec., p. 10). The agencies that my bank represented on this lumber were not able to carry the insurance to as large an amount as the Lumber Company wanted to place, so they requested me to secure some other insurance for them. They were familiar with the fact that I could not furnish that amount in the agencies I had in the bank (Rec., p. 10).

The application for this insurance was made to C. H. Spencer & Co., of Minneapolis, Minn., through me; there were 12 policies secured from C. H. Spencer & Co. I did not know Geo. R. Davis & Co. in the transaction (Rec., p. 9).

The finding on this point of the trial court, affirmed by the Supreme Court, is: Defendant made application to the bank for more insurance than it was able to write *"in its own companies"* (Rec., p. 39). The additional insurance desired was placed by Mr. Marsh, an employee of the bank, *"with outside agencies"* (Rec., p. 39).

This policy came through Geo. R. Lewis & Co., of Minneapolis, Minn. (Rec., p. 39).

"Aside from this transaction, there is no evidence that "the said insurance company in any manner solicited or "issued insurance within this State, or did any act in con- "nection with such business which is in violation of the "Statutes of Michigan (Rec., pp. 39 and 40). For the "disposition of this case we may assume that *Marsh acted "as agent of defendant in securing the insurance"* (Rec., p. 41).

"While *this may be held to be an Ohio contract,* nevertheless we cannot escape from the fact that it was a contract to insure within the State of Michigan property of a citizen of the State, and was taking an insurance risk in this State" (Rec., p. 42).

"Regulating the business of insurance, even to the exclusion of foreign insurance companies from taking any risks in the State *under any conditions,* has been held constitutional" (Rec., p. 42).

Then the trial court cites:

Seamans v. Temple, 105 Mich., 401, which is a decision substantially like the decision in the case at bar, excepting that in the Seamans-Temple case the court found that the insurance company had solicited the policy through its agent within the State of Michigan.

On page 42 of the Record, the Supreme Court of Michigan refers to *Seamans v. Temple,* and on page 43 of the Record, quotes therefrom, viz:

"If it be conceded that the contract was made in Wisconsin, and that the premiums and loss, if any, are payable there, it is as much in contravention of the policy of this State as though it had been made and was to be performed there.

"It cannot be supposed that the statutes cited were intended *merely to prevent the act of making the contract in* this State. The object is to protect citizens of this State against irresponsible companies, and to prevent insurance by unauthorized companies *upon property in this State.*"

And near the bottom of page 43 of the Record, the court again refers to the Seamans-Temple case and says:

"The contention in this case is the same as in the case above cited. It is true in that case the court found that *within the State* the insurance company had solicited the insurance; but in answer to the arguments there advanced, the court very properly decided the case upon the broader ground. The reasoning in that case is adopted in the case at bar and controls it."

It is plain that the position of both the Circuit and Supreme Courts of Michigan, in the case at bar, is that they considered that the contract of insurance was consummated *outside of the State of Michigan,* and that they regarded the mere fact of issuing the policy on property located in Michigan for residents of Michigan was itself a violation of the statutes of that State and in itself justified the courts of Michigan in refusing to this plaintiff in error the right to maintain an action in that State, notwithstanding that no act was done in that State by any one in any way representing that insurance company.

So it appears in this case that the position taken in Defendant's Brief as to the facts on this, the essential point, is in conflict with the evidence as plainly set forth in the Record, and is also in conflict with the findings of fact of both the Circuit and Supreme Courts of Michigan.

And that the position taken by the Supreme Court of Michigan in this case, as to the law, is in direct and plain conflict with decisions of this court, and with the decisions of the Supreme Courts of nearly all of the States, including two previous decisions of the Supreme Court of Michigan.

And that in this case that court plainly erred so as to violate Sec. 1 of the 14th Amendment of our Federal Constitution, in depriving this plaintiff in error of property without due process of law, and in denying to him the equal protection of the laws.

And that the decision of that court should be reversed.

Respectfully submitted,

PATTERSON A. REECE,
VIRGIL I. HIXSON,
Counsel for Plaintiff in Error.

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No. 145.

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THE WESTON LUMBER COMPANY.

BRIEF FOR THE DEFENDANT IN ERROR.

EDWARD C. CHAPIN,
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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24675

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vs.

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IN ERROR TO THE SUPREME COURT OF MICHIGAN.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This action was commenced by plaintiff in error in the circuit court of Schoolcraft county, Michigan, to recover from defendant in error, a Michigan corporation, doing business in said Schoolcraft county, an alleged due proportion of the unpaid liabilities of said insurance company, claimed to have been incurred during the time said defendant held a policy of insurance therein, covering property in said Schoolcraft county.

A written stipulation was offered in evidence on the trial that plaintiff in error was a corporation organized under the laws of the State of Ohio, and that it had never complied with

any of the requirements of the several statutes of the State of Michigan obligatory upon insurance companies of other States seeking to transact business in the State of Michigan.

Record, 37–38.

Defendant in error does not admit the allegation in the statement of plaintiff in error in his brief that "no act in regard to said policy was done in Michigan by any one representing said insurance company," but, on the contrary, claims that the business was transacted in Michigan by one representing the insurance company, and in direct violation of the Michigan statutes.

ARGUMENT.

The first claim of plaintiff in error is that the insurance agent who obtained the policy of insurance from the Ohio Company was the agent of the Weston Lumber Company, and not the agent of the insurance company.

In September, 1889, the Manistique Bank of Manistique, Schoolcraft county, Michigan, was engaged in banking, insurance, and mortgage loan business, and was carrying insurance in various companies on the property of the Weston Lumber Company. Wishing to increase the amount of insurance, application to this effect was made to said bank. One Willis C. Marsh, an employee of said bank, transacted the business. On page 9 of the Record he says: "There were twelve policies altogether, secured through C. H. Spencer & Co. to increase the line that we had in these companies' lumber, and the policies that we had through the bank from other sources were not sufficient, and in the regular course of business we applied for this agency, and they furnished these two policies, together with others."

Again (Record, 9): "So far as I know the original application for this insurance was made to C. H. Spencer & Co. through me, the Weston Lumber Company first applying to the bank."

Again (Record, 10): "I had placed considerable insurance with the agencies my bank represented on this same lumber, and the same agencies were not able to carry the insurance to as large an amount as the company wanted to place, so they requested me to secure some other insurance for them, as I remember it they asked for an amount of insurance which was raised from different sources. They were familiar with the fact that I could not furnish that amount in the agencies I had in the bank."

The Weston Lumber Company and the Manistique bank were separate and distinct corporations, one engaged in the lumber business and the other in the insurance and other business.

If the bank and Mr. Marsh were the agents of the insurance companies in which they placed the insurance of the lumber company, it would seem to follow that they were the agents of all the companies carrying the insurance. There is nothing to show that the lumber company gave any directions relating to the insurance or did anything more than make the ordinary request in such cases.

It is fair to conclude from the testimony of Mr. Marsh that the policies in question were sent to him or to the bank and were delivered to the lumber company on payment of the premiums to the bank or Mr. Marsh. The policies were written in Cincinnati, but they were not valid until countersigned in Minneapolis.

Record, 31.

The negotiations were commenced and closed at the bank in Manistique.

The situation is well stated by Judge Steere. Speaking of Mr. Marsh (Record, 40–41), he says: "He was an employee of the local insurance agency which had secured a line of insurance from the defendant.

"The defendant thereafter, on its part, merely applied to this agency in its own home town for an increase of insurance, which the agency accepted and proceeded to place it

as best it could, turning that which it could not care for itself over to other agencies.

"The selection of this particular insurance company in which to place a portion of the risk was evidently made in the usual course of business either by the local agent at Manistique or George R. Lewis & Co., of Minneapolis, Minnesota, and the details of the application, obtaining the policy, agreeing on the policy, etc., were worked out in the usual course of business by the insurance agency, although accepted and ratified by the defendant. But so far as the defendant was concerned its application for insurance was made and this business done with the home office at Manistique with which it was in the habit of doing business."

The case is not one between a resident of Michigan and a foreign corporation where the contract was made by correspondence, but is one brought about and completed in the State of Michigan by a representative of the foreign corporation.

There is no doubt of the power of the State to prohibit foreign insurance companies from doing business within its limits. The State can impose such conditions as it pleases upon the doing any business by those companies within its borders, and unless the conditions be complied with the prohibition may be absolute.

Hooper *vs.* California, 155 U. S., 648.

The power above stated has been exercised by the State of Michigan, and the same has been sustained by its supreme court.

Seamans *vs.* Temple Co., 105 Mich., 401.

Swing *vs.* Weston Lumber Co., Record, 43.

We submit that the record in this case shows that the plaintiff in error transacted its business within the State of Michigan and in violation of its laws, and that the judgment of the supreme court of Michigan should be affirmed.

EDWARD C. CHAPIN,
Counsel for Defendant in Error.

Supreme Court of the United States.

No. 145.—October Term, 1906.

James B. Swing, as Trustee for the Creditors of The Union Mutual Fire Insurance Company of Cincinnati, Ohio (formerly a corporation), Plaintiff in Error,
vs.
The Weston Lumber Company.

In error to the Supreme Court of the State of Michigan.

[April 8, 1907.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This action was brought in the Circuit Court of Schoolcraft County, Michigan, by Swing, trustee of the Union Mutual Fire Insurance Company, a corporation of Ohio, against the Weston Lumber Company, a corporation of Michigan, to collect its share as a policy holder of an assessment made by the order of the Supreme Court of Ohio in liquidating the liabilities of the insurance company.

The assessment against defendant was in respect of a policy for $5,000 and a renewal thereof on defendant's lumber and other property at Manistique, Michigan. The insurance company was never licensed to do business in Michigan, and the defense was pleaded that it was a foreign corporation, not authorized to transact business in that State, and that the policies were issued in direct violation of the laws of Michigan, the company not having complied with those relating to foreign insurance companies doing business in the State; and that the contracts of insurance were at variance with and contrary to the settled policy of the State.

The case was tried by the court without a jury. At the conclusion of the trial plaintiff made requests for certain findings as matters of law, including this:

"11. That the statutes of this State do not and could not under the Constitution of the United States prohibit this defendant from going or sending outside of this State and there procuring insurance on property belonging to the defendant and located in this State from an insurance company not authorized to do business in this State;"

which the court refused.

Findings of fact and conclusions of law were made and filed. It was found, among other things, that—

"In the latter part of the summer of 1889 defendant desired to increase the amount of insurance carried upon lumber accumulated in its yards, and made application to a local agency conducted by a banking institution

of the town for a considerable addition to the line of its insurance already held in that agency. Not being able to write, in one risk, in its own companies, the amount of additional insurance desired, the local agency, through W. C. Marsh, an employee of the bank, who attended to its insurance business, placed twelve different policies with outside agencies. Part of this line of insurance was sent to George R. Lewis & Company, an agency of Minneapolis, Minnesota, through which concern the $5,000 insurance involved in this case was placed with the said Union Mutual Fire Insurance Company of Cincinnati, Ohio."

It was admitted that the insurance company had never complied with any of the requirements imposed by the statutes of Michigan on insurance companies of other States seeking to transact business in Michigan.

Sections 5157 and 10467 of the Compiled Laws of Michigan of 1897 are as follows:

(5157.) "That it shall be unlawful for any person or persons, as agent, solicitor, surveyor, broker, or in any other capacity, to transact or to aid in any manner, directly or indirectly, in transacting or soliciting within this State any insurance business for any person, persons, firm or copartnership who are non-residents of this State, or for any fire or inland navigation insurance company or association, not incorporated by the laws [or] of this State, or to act for or in behalf of any person or persons, firm or corporation, as agent or broker, or in any other capacity, to procure, or assist to procure, a fire or inland marine policy or policies of insurance on property situated in this State, for any non-resident person, persons, firm or copartnership, or in any company or association without this State whether incorporated or not, without procuring or receiving from the commissioner of insurance the certificate of authority provided for in section twenty-three of an act entitled 'An act relative to the organization of fire and marine insurance companies transacting business within this State,' approved April third, eighteen hundred and sixty-nine, as amended. Such certificate of authority shall state the name or names of the person, persons, firm or copartnership, or the location of the company or association as the case may be and that the party named in the certificate has complied with the laws of this State, regulating fire, marine, and inland navigation insurance, and the name of the duly appointed attorney in this State on whom process may be served." Act of 1881, § 1.

(10467.) "But when, by the laws of this State, any act is forbidden to be done by any corporation, or by any association of individuals, without express authority by law, and such act shall have been done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or made or entered into in consideration of such act."

Judgment was entered in favor of defendant, and affirmed, on error, by the Supreme Court of Michigan. *Swing* v. *Weston Lumber Company*, 140 Mich. 344.

The Supreme Court held that a foreign mutual insurance company, which had not been authorized to do business in Michigan as provided by its statutes, could not maintain a suit to collect assessments due on a policy

issued by one of its agents in another State on request of an insurance broker of Michigan who was unable to place the whole line in his own authorized companies. *Seamans* v. *Temple Company*, 105 Mich. 400, citing many cases, was referred to and quoted from. It appeared therefrom that it had been for years the policy of the State to limit the business of insurance to such corporations, domestic and foreign, as should be authorized to do business, after compliance with certain regulations and conditions prescribed by law, and that the statutes were intended to be prohibitory in their character.

The power of the State to prohibit foreign insurance companies from doing business within its limits, or in allowing them to do so to impose such conditions as it pleases, is undoubted. *Hooper* v. *California*, 155 U. S. 648; *Security Mutual Life Insurance Company* v. *Prewitt*, 202 U. S. 246; *Chattanooga National Building & Loan Association* v. *Denson*, 189 U. S. 408.

What was held here on the facts was that the contract was brought about and completed in Michigan by a representative of the foreign corporation. So far as defendant was concerned its application for insurance was made and the business was done with the home office at Manistique, with which it was in the habit of doing business. It was not a case of defendant "going or sending outside of this State and there procuring insurance on property belonging to the defendant and located in this State from an insurance company not authorized to do business in this State," as supposed in plaintiff's eleventh request for finding. That request is the only pretense in the record of a Federal question being raised prior to the judgments below, and was entirely inadequate for that purpose. Naturally enough, neither the Circuit Court nor the Supreme Court referred to any Federal question whatever.

The writ of error cannot be maintained. *Chicago, Indianapolis & Louisville Railway Company* v. *McGuire*, 196 U. S. 128, 132; *Allen* v. *Allegheny County*, Id. 458.

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.